No. 15241

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DAVID FARRELL and OLIVER J. FARRELL,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

OPENING BRIEF OF APPELLANT OLIVER J. FARRELL.

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OPENING BRIEF OF APPELLANT OLIVER J. FARRELL.

Statement of the Pleadings.

By Indictment No. 30341, which superseded Indictment No. 25960, Appellants David Farrell, Oliver J. Farrell along with Stanley C. Marks were charged in Counts 1 through 17 of violation of Section 17(2)(1) of the Securities Act of 1933, 15 U. S. Code Section 77q(2)(1), which provides as follows:

> It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly to employ any device, scheme, or artifice to defraud.

They were further charged in Counts 18 through 33 with Mail Fraud in violation of 18 U. S. Code Section 1341, which provides as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000.00 or imprisoned not more than five years, or both.

In Count 34 they were charged with Conspiracy in violation of 18 U. S. Code Section 371, which provides as follows:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or

more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000.00 or imprisoned not more than five years, or both.

[Clk. Tr. pp. 119-193.]

Statement of the Case.

Trial by jury was had, following the close of the Government's case, the Government moved to dismiss Counts 3 and 33, which motion was granted. [Clk. Tr. p. 449.] Each defendant put on a defense, whereupon the jury was instructed, and following deliberation returned the following verdicts:

Stanley C. Marks was found Not Guilty as to all counts [Clk. Tr. p. 512-A]; and Appellants David Farrell and Oliver J. Farrell were each found Guilty on all counts. [Clk. Tr. pp. 505-512.]

Appellant Oliver J. Farrell was sentenced to 2 years imprisonment and fined the sum of $2,000.00 on each of Counts 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17 (the Securities Act Counts), the prison terms to run concurrently and making a total fine of $32,000.00.

He was sentenced to 2 years imprisonment and fined the sum of $1,000.00 on each of Counts 18 through 32 (the Mail Fraud counts), the prison terms to run concurrently and making a total fine of $15,000.00.

On the Conspiracy count 34 he was sentenced to 2 years imprisonment and fined the sum of $5,000.00.

The sentences under the Mail Fraud counts were to run concurrent with the Securities Act counts; Count

34 was to run concurrent with the Securities Act counts and consecutive with the Mail Fraud counts, making a total of four years imprisonment and a total fine of $52,000.00. [Clk. Tr. p. 554.]

Notice of Appeal was filed [Clk. Tr. p. 562] and the matter is now before this court, which has jurisdiction to review the judgment of conviction as it arises from alleged violations of the Federal law as set forth in the above-designated sections of the United States Code.

Statement of Facts.

Appellant Oliver J. Farrell hereby adopts the statement of facts as stated in the Opening Brief of Appellant David Farrell, which is being filed concurrently herewith. In addition, reference is made to the facts stated in the opinion of *Securities and Exchange Commission v. Los Angeles Trust Deed and Mortgage Exchange, et al.*, 285 F. 2d 162, which covered the same subject matter in a civil proceeding against the same appellants as is presented in the instant criminal proceeding.

Reference to Exhibits.

Over 2,000 documents were introduced into evidence at the trial and would be too extensive to present as part of this brief. Counsel has conferred with Government counsel on this matter and have agreed that the Government counsel will submit a complete exhibit register to this Honorable Court covering all of the exhibits in this case.

ASSIGNMENTS OF ERROR AND ARGUMENTS.

Appellant Oliver J. Farrell hereby adopts each and every assignment of error and argument presented in the Opening Brief of David Farrell, which is being filed concurrently herewith. In addition, he presents the following assignment of error and argument solely on his own behalf:

The Evidence Is Insufficient on All Counts as a Matter of Law to Sustain the Judgment of Conviction on All Counts.

In the prosecution of this case the government presented an extremely thorough case establishing how the Los Angeles Trust Deed and Mortgage Exchange had engaged in a course of conduct which violated the Securities Act of 1933 and engaged in Mail Fraud. The evidence was directed primarily against the defendant David Farrell who ran the company and directed all of its policies.

In order to fully appreciate the lack of evidence against Oliver J. Farrell in all of the counts on which he was convicted it must be borne in mind that this case was the subject of an intense investigation, the Securities & Exchange Commission having had a receiver running the business since June 8, 1960 and acquired complete access to all of the company's documents and records. It can be stated with substantial certainty that any and all possible evidence which could have been presented against Oliver J. Farrell was produced at the trial, so the Government has actually presented the strongest case it could against him. This lack of evidence sufficient to convict can be illustrated by an

analysis of the testimony of the key witnesses, both prosecution and defense, which clearly illustrated the limited role played by Oliver J. Farrell in the company's activities.

Thomas Wolfe, Jr., assistant to the president, David Farrell, was produced as a government witness, and testified in detail as to L.A.T.D. & M.E.'s activities, as well as those of related corporations. All of the corporations involved were solely owned by David Farrell. David Farrell gave him instructions to create a bank-like atmosphere [Rep. Tr. p. 157] and he alone purchased the trust deeds on unimproved property and prepared the information concerning them. [Rep. Tr. pp. 163, 169, 227.] The advertising firm, Prestige Incorporated, which was owned and controlled by David Farrell, prepared the printed literature which was sent out by the company. [Rep. Tr. pp. 167-168, 334-335.]

Upon Mr. Wolfe first assuming his duties David Farrell did the editing of the letters to the customers. [Rep. Tr. p. 169] and throughout Mr. Wolfe's tenure gave instructions regarding choice of terminology to be used. [Rep. Tr. pp. 196-197.]

Wolfe at pages 159 and 160 described the very limited function of Oliver J. Farrell as heading up the sales organization, conducting sales conferences, making sales meeting speeches, preparing sales literature and breaking in new salesmen.

Albert R. Durham, Director of Trust Deed Selection for the company testified at great length about the company's activities and never once mentioned having any dealings with Oliver J. Farrell. [Rep. Tr. pp. 710-999.]

Monroe R. Stark, a salesman for the company, who was also called as a government witness, testified at great length as to the operation of the sales department, with Oliver J. Farrell in charge. In all of his testimony the only item which even remotely hinted at misrepresentation was the sales "pitch" to properly create the impression to customers that this market place for selling trust deeds would be helpful in liquidating 10% earning accounts. [Rep. Tr. p. 541.]

The only other transaction which could be strained as evidence against Oliver J. Farrell was the fact that he instructed the salesmen not to volunteer the fact of the pending civil litigation with the S. E. C., and if specifically asked to inform the customer that there was no basis for any fraud or insolvency charges. [Rep. Tr. p. 563.]

At pages 683 to 685 of the Reporter's Transcript Mr. Stark testified that Oliver J. Farrell was very strict about the salesman following the language of the company brochure in the sales presentation; that they were not authorized to change the language in the brochure; and that the salesmen could use any selling techniques as long as they did not conflict with the brochure.

As previously stated, the evidence in the record established that David Farrell solely was responsible for preparation of the brochures.

Oliver J. Farrell took the stand in his own defense. After L.A.T.D. & M.E. had already been in existence he joined the firm in the fall of 1955 being hired by David Farrell, eventually in 1957 becoming sales manager of the company. His sales material, which he distributed to the salesmen, was taken from a publica-

tion by Prentice-Hall Publishers entitled Miracle Sales Guide. His explanation of the matters brought out in the testimony of Mr. Stark was as follows:

"Q. Why did you instruct salesmen to explain the Los Angeles Trust Deed & Mortgage Exchange civil litigation with Securities and Exchange Commission only if a customer would ask about it, a prospective customer? A. There had been quite a few inflammatory articles in the newspapers concerning the SEC's charges, and I felt from time to time most big businesses, and in fact most businessmen, do have civil litigation with bureaus or government or agencies. I felt that we should put our best foot forward at all times and not invite people's attention to a civil suit, which I felt would be resolved to our satisfaction in a very short period of time.

I also felt that most of our prospective customers, if not all of them, were already aware of the civil litigation because of the newspaper articles, and also commentaries on television and radio, and it was unnecessary to invite their attention to it. Normally, they would ask us about it.

Q. Were you aware that a receiver would take control of Los Angeles Trust Deed & Mortgage Exchange on June 8, 1960? A. No, sir.

Q. Why did you think that?

The Court: I don't follow your question.

Q. (By Mr. Holder): On what basis did you have that opinion? A. The attorneys for the company, Morgan Cuthbertson and Paul J. Foley, explained to me that this action was similar to

that which had transpired a year or a year and a half previously; that the SEC had obtained a similar injunction at that time and the court had ordered a receiver in then. However, the attorneys were able to have that action appealed and stayed, and on the remand of the case they stated that they felt that they would have the same success with the appellate court, that they would successfully have the lower court's orders reversed.

Q. Why didn't you stop selling trust deeds after May 20, 1960? A. Well, sales were more important then than ever before, with the bad publicity that we had in the papers. On instructions from the attorneys and from David Farrell I encouraged the sales department to roll up their sleeves and work even harder to bring in sales. I felt that it would be an act of disloyalty to walk out on the company because it was having some civil problems.

Q. Do you know personally of any customer of Los Angeles Trust Deed & Mortgage Exchange who sustained a loss prior to June 8, 1960? A. No, sir, not one." [Rep. Tr. p. 3106, line 21, to p. 3108, line 18.]

Under intensive cross-examination the well-prepared Government was unable to establish any evidence that Oliver J. Farrell had engaged in any transactions with intent to defraud or that he had any control over the company or that he had any knowledge that any fraud was being practiced by the company. His testimony that he instructed the salesman to follow the language in the brochure was not refuted. [Rep. Tr. p. 3122.] David

Farrell supplied the information that there was to be a trust fund for investors' money [Rep. Tr. p. 3134], that David Farrell owned Mortgage Insurance Company of America [Rep. Tr. p. 3138], Oliver J. Farrell denied any knowledge of all of the various corporations created by David Farrell and also denied knowledge of any side participation agreements which David Farrell engaged in. [Rep. Tr. pp. 3162-3163.] With over 2000 documents introduced by the Government none were produced to refute this testimony of Oliver J. Farrell.

The Government grasped at straws in attempting to tie in Oliver J. Farrell with the side participation agreements of David Farrell. With millions of dollars and thousands of lots involved in the side participation agreements, of which David Farrell received 50% for his own benefit, the government tried to make Oliver J. Farrell a participant therein by showing that he received the grand total of 4 lots of Embarcadero property. These 4 low value lots were subject to a $5,000.00 mortgage which Oliver J. Farrell assumed. In addition he agreed to develop *at his own expense* a horse stable and riding academy in order to enhance the value of the Embarcadero tract. [Rep. Tr. pp. 3156-3158.] This undisputed evidence clearly showed that he was supplying services and money for the above 4 lots and was not receiving them as a participant in a fraudulent scheme.

Co-defendant Stanley C. Marks testified in his own behalf. Not one transaction involving Oliver J. Farrell was involved in his testimony.

Morgan Cuthbertson, formerly a staff attorney for the Securities & Exchange Commission for 13 years in Los Angeles, related how he was hired by David Farrell

to advise the firm in its dealings with S.E.C. This critical witness brought out that he dealt with David Farrell exclusively in his relationship as attorney for L.A.T.D. & M.E. and that David Farrell prepared the brochures. Nowhere in his testimony is there any suggestion that Oliver J. Farrell had any voice in directing the company's policy.

Thomas J. Graham, the appraiser employed by L.A.T.D. & M.E. did not even mention Oliver J. Farrell in his testimony.

David Farrell testified in his own behalf, stating that he first entered the mortgage business in 1952 [Rep. Tr. p. 3703], organizing L.A.T.D. & M.E. in 1954. [Rep. Tr. p. 3705.] He testified at length as to how he organized and ran the company, made all decisions on policy, organized various side corporations which he solely controlled, and solely entered into numerous side participation agreements to acquire trust deeds for L.A.T.D. & M.E.

His role in the proceedings is best illustrated by the following testimony.

> "Q. Who primarily made the policy decisions of the Los Angeles Trust Deed & Mortgage Exchange? A. I did.
>
> Q. Did Mr. O. J. Farrell make those decisions? A. No, he did not make the decisions." [Rep. Tr. p. 4040, lines 20-24.]
>
> Q. If you were to characterize the company, would you characterize it as a one-man company under your direction? A. I would characterize it as being completely under my direction, yes, sir." [Rep. Tr. p. 4041, lines 2-5.]

His testimony, at pages 4225-4226, verified that Oliver J. Farrell in return for the 4 Embarcadero lots did establish stables of high quality, the horses appearing in many horse shows under the name of Embarcadero Stables throughout California.

From the record there is no question that David Farrell completely controlled the 10% Secured Earnings program of L.A.T.D. & M.E., with nobody within the company framework in a position to challenge the manner in which he ran the company. This is especially true when he clearly let it be known to all persons that his activities were being carried out pursuant to the advice of an attorney who had spent 13 years with the S.E.C. Rather than go through all of the various arguments and justifications for the policy of the company, reference is made to *Declaration of David Farrell,* set forth in pages 228-235 of the Clerk's Transcript. It is difficult to conceive of any employee challenging these persuasive sounding arguments.

Appellant, Oliver J. Farrell, respectfully urges that the evidence is insufficient to impute to him any knowledge of any fraudulent scheme or any intent to defraud. His role as only sales manager in this highly departmentalized operation is thoroughly demonstrated throughout the record, as is the fact that David Farrell made all of the policy decisions, directed the operations of the company and caused huge profits to be made by his solely owned corporations which dealt with L.A.T.D. & M.E. True, Oliver J. Farrell is the brother of David Farrell, and that fact undoubtedly had great influence on the jury in arriving at their verdicts to convict him. This is especially true when this Honorable Court con-

siders the background of the prejudicial newspaper publicity and public hysteria during the course of the trial. The extremely fair trial judge constantly admonished the jury not to read the newspaper accounts of the trial and made every reasonable attempt to conduct the trial free from outside pressure on the jury. From the foregoing examination of the record, however, it appears clear that Oliver J. Farrell's activities are as reasonably consistent with innocence as with guilt on all counts, so the convictions cannot be sustained on the evidence introduced against him.

> "The verdict in a criminal case is sustained only when there is 'relevant evidence from which the jury could properly find or infer, beyond a reasonable doubt,' that the accused is guilty. *Mortenson v. U. S.*, 322 U. S. 369, 64 S. Ct. 1037, 88 L. Ed. 1331."
>
> *American Tobacco Co. v. United States* (1946), 328 U. S. 781, 66 S. Ct. 1125, 90 L. Ed. 1575.

In *Gravatt v. United States* (1960, 10 Cir.), 260 F. 2d 498, the court held:

> "It is, of course, Hornbook law that in criminal cases, the Government must prove the defendant guilty beyond a reasonable doubt, and if the undisputed evidence is as consistent with innocence as with guilt, the Government has failed to make a case to go to the jury."

In accord:

Leslie v. United States (10 Cir.), 43 F. 2d 288;
Moore v. United States (10 Cir.), 56 F. 2d 794;
McClintock v. United States (10 Cir.), 60 F. 2d 839;

Patterson v. United States (10 Cir.), 62 F. 2d 968;

Parnell v. United States (10 Cir.), 64 F. 2d 324;

Gargotta v. United States (8 Cir.), 77 F. 2d 977.

Where guilt in prosecution for using mails to defraud, violation of Securities Act, and conspiracy rests upon circumstantial evidence, government has burden of proving its case not only beyond a reasonable doubt, but to exclusion of every reasonable hypothesis of innocence. *Beckman v. United States* (1938, 5 Cir.), 96 F. 2d 15.

Directing the Court's attention to Count 34, the Conspiracy count, again there is nothing in the record to establish that Oliver J. Farrell joined a conspiracy, either in the way of direct or circumstantial evidence. Conjecture and speculation cannot take the place of evidence.

In *Ingram v. United States,* 360 U. S. 672, 79 S. Ct. 1314, 3 L. Ed. 2d 1503, in setting aside the conviction the court relied upon and at page 680 quoted the language of *Direct Sales Co. v. United States,* 319 U. S. 703, 63 S. Ct. 1265, 87 L. Ed. 1674, as follows:

> "Without knowledge the intent cannot exist. . . . Furthermore, to establish the intent, the evidence of knowledge must be clear, not equivocal. . . . This, because charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning . . . a dragnet to draw in all substantive crimes."

The *Direct Sales Co.* case, *supra,* also considered the effect of holding in *United States v. Falcone,* 311 U. S. 205, 61 S. Ct. 204, 85 L. Ed. 128, and at page 709 adopted the interpretation:

> "that one does not become a party to a conspiracy by aiding and abetting it, through sales of supplies or otherwise, unless he knows of the conspiracy; and the inference of such knowledge cannot be drawn merely from knowledge that the buyer will use the goods illegally."

Conclusion.

Wherefore, in view of the foregoing, Appellant Oliver J. Farrell respectfully requests that the Judgment of viction as to all 32 Counts be reversed, and that the charges against him be ordered dismissed as to all counts.

Respectfully submitted,

GOULD & ARONSON and
PAUL AUGUSTINE, JR.,
Attorneys for Appellant
Oliver J. Farrell.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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Attorney for Appellant
Oliver J. Farrell.

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APPELLEE'S BRIEF.

(Appendices Under Separate Cover)

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APPELLEE'S BRIEF.

I.

JURISDICTIONAL STATEMENT.

The appellants David Farrell and Oliver J. Farrell were indicted by the Federal Grand Jury for the Southern District of California, Central Division, on December 20, 1961.[1] The indictment contained thirty-four counts. The first seventeen counts alleged offenses under Section 17(a)(1) of the Securities Act of 1933, 15 U. S. C. 77q(a)(1). The following sixteen counts alleged offenses under the Mail Fraud Statute, 18 U. S. C. 1341. The last count alleged a conspiracy (18 U. S. C. 371) to violate Section 17(a)(1) of the

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[1]This indictment, No. 30341-CD, superseded an earlier indictment, No. 29560-CD, returned on March 8, 1961 [C. T. 2, 119]. On March 6, 1962, prior to the commencement of trial on No. 30341-CD, the superseded indictment, No. 29560-CD, was dismissed on the court's own motion [C. T. 113].

Securities Act and the Mail Fraud Statute [C. T. 119].[2]

The appellants were arraigned, entered pleas of not guilty, and following a twenty-seven day trial by jury they were convicted on all 32 counts that went to the jury[3] [C. T. 505, 509]. A third defendant, Stanley C. Marks, was acquitted on all 32 counts [C. T. 512A].

The appellant David Farrell was sentenced on the sixteen securities counts to a cumulative period of five years imprisonment and fined a total of $64,000. He was sentenced on the fifteen mail fraud counts to a cumulative period of five years imprisonment and fined a total of $15,000, the sentences of imprisonment to run concurrently with the sentences imposed under the securities counts. He was also sentenced to five years imprisonment on the conspiracy count and fined $7,500, with the prison sentence to run concurrently with the sentences imposed under the securities counts, and consecutively with the sentences under the mail fraud counts. Thus, David Farrell was sentenced to a total of ten years imprisonment and fined a total of $86,500 [C. T. 554].

The appellant Oliver J. Farrell was similarly sentenced to concurrent and consecutive terms of imprisonment totaling four years and fined a total of $52,000 [C. T. 554].

The sentences imposed by the court, as to both appellants, were made subject to the provisions of 18 U. S. C. 4208(a)(2), the court fixing the aforemen-

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[2]C. T. refers to Clerk's Transcript of Record.

[3]Two counts were dismissed by the government during the course of trial [R. T. 3406].

tioned maximum periods of imprisonment to be served by the appellants David Farrell and Oliver J. Farrell at ten and four years respectively, and specifying that appellants shall become eligible for parole at such time as the Board of Parole may determine [C. T. 554].

The jurisdiction of the district court rests on Sections 20(b) and 22(a) of the Securities Act of 1933, 15 U. S. C. 77t(b) and 77v(a), and 18 U. S. C. 3231. This Court has jurisdiction to review the judgments of the district court pursuant to 28 U. S. C. 1291 and 1294.

II.

STATUTES INVOLVED.

The Indictment was brought under three different statutes, which provide in pertinent part, as follows:

15 U. S. C. 77q(a)(1), (Sec. 17(a)(1) of the Securities Act) *re*: counts one, two, and four through seventeen, inclusive:[4]

> "(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commece or by the use of the mails, directly or indirectly—
>
> "(1) to employ any device, scheme, or artifice to defraud . . ."

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[4]The penalty provision relating to Section 77q(a)(1) may be found in 15 U. S. C. 77x, which provides, in pertinent part as follows:

> "Any person who willfully violates any of the provisions of this subchapter, . . . shall upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both."

18 U. S. C. 1341 (Mail Fraud Statute) *re*: counts eighteen through thirty-two, inclusive:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

18 U. S. C. 371 (conspiracy statute):

> "If two or more persons conspire either to commit any offense against the United States, . . . and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both. . . ."

III.

STATEMENT OF THE CASE.

A. Summary of Indictment.

The indictment is in thirty-four counts. The first, or "base count," alleges a scheme to defraud in the sale of securities by Los Angeles Trust Deed & Mortgage Exchange under its Secured 10% Earnings Program, in violation of Section 17(a)(1) of the Securities Act of 1933 (Securities Act), 15 U. S. C. 77q (a)(1). The "base count" describes the scheme to defraud in detail. The scheme is set forth in the Statement of Facts, *infra* page 9. The next sixteen counts, each of which also alleges a separate violation of Section 17(a)(1) of the Securities Act, incorporate by reference the allegations made in the "base count." These seventeen counts are the "securities counts."

The following sixteen counts of the indictment, also by reference to the "base count", incorporate the statement of the scheme to defraud as set forth in the "base count," except that the instruments through which the scheme was accomplished are not described as securities. These are the mail fraud counts, alleged in the language of the Mail Fraud Statute, 18 U. S. C. 1341.

The thirty-fourth, and last count, alleges a conspiracy to violate the Securities Act and the Mail Fraud Statute, in violation of 18 U. S. C. 371. The conspiracy count also alleges and incorporates by reference the allegations made in the "base count," as constituting elements of the conspiracy, and sets forth numerous other overt acts accomplished in furtherance of the conspiracy.

B. Pre-Trial and Trial Proceedings.

Extensive pre-trial proceedings were conducted, commencing on January 5, 1962, under the guidance of United States District Judge John F. Kilkenny [C. T. 194]. During these proceedings, appellants were arraigned, entered pleas of not guilty, and presented many motions to the court, the rulings on which are not contested on this appeal [C. T. 212; 362; 413].

The government marked for identification and exhibited to appellants some two thousand numbered exhibits prior to the trial, many of which contained numerous attachments. More than one thousand of these exhibits were stipulated to as being genuine and authentic [C. T. 375-410].

On March 6, 1962, the taking of testimony commenced before Judge Kilkenny, and continued for twenty-seven trial days, concluding on April 13, 1962, with the court's instructions and submission of the case to the jury [C. T. 418-464]. On April 16, 1962, the jury returned verdicts of guilty as to both appellants, on each of the 32 counts submitted to them [C. T. 505-512D].

On April 20, 1962, counsel for appellant Oliver J. Farrell filed a motion for judgment of acquittal or, in the alternative, for new trial [C. T. 542]. Counsel for appellant David Farrell filed similar motions on April 23, 1962 [C. T. 547]. Numerous supplemental memoranda, declarations and statements were filed on behalf of appellants prior to the date of hearing [C. T. 519-521; 522-524, 525-526; 527-529; 530-541]. All motions were opposed in the government's written opposition [C. T. 550]. On May 14, 1962, following argu-

ment on the motions, the court denied each of them [C. T. 553; R. T. 4348-4381].[5]

On May 14, 1962, Judge Kilkenny sentenced appellants [C. T. 554; R. T. 4382-4397]. Both appellants gave oral notice of appeal at the time of sentencing [R. T. 4393; 4398], and subsequently filed, in timely fashion, their written notices of appeal [C. T. 560; 562].

On June 12 and June 18, 1962, appellants David Farrell and Oliver J. Farrell, respectively, filed their "Designation of Contents Of Record On Appeal"[6] [C. T. 564, 568], which were followed on June 28, 1962, by Appellee's Counter Designation [C. T. 573].

Appellants have filed separate opening briefs on this appeal. Appellee has consolidated its response in this Brief.

IV.

INTRODUCTION TO STATEMENT OF FACTS.

The appellants concede that the evidence submitted to the jury was sufficient to establish the existence of a scheme and conspiracy to defraud. Indeed, the appellant Oliver J. Farrell, with extraordinary candor, admits that "the government presented an extremely thorough case, establishing how the Los Angeles Trust Deed & Mortgage Exchange had engaged in a course of conduct which violated the Securities Act of 1933 and engaged in Mail Fraud" [Brief, OJF p. 5]. This

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[5]"R. T."—refers to Reporter's Transcript of Proceedings.

[6]Neither of appellants' designations contained ". . . a concise statement of the points on which he intends to rely. . . ." as required by Rule 17(c) of the Rules of the United States Court of Appeals for the Ninth Circuit.

appellant then proceeds to cast all blame on David Farrell, his brother and co-appellant, noting, for example, the manner in which "David Farrell made all of the policy decisions, directed the operations of the company and caused huge profits to be made by his solely owned corporations which dealt with LATD&ME." [Brief, OJF p. 12].

With somewhat less candor, the brief for David Farrell admits [Brief, DF pp. 13-14] that "appellant does not assert insufficiency of the evidence simply in recognition of the limited role a reviewing court has in such a situation . . ."

Neither appellant has attempted to furnish this court with a summary of the facts as shown by the record. The reason for this omission is evident. The evidence of a deliberately planned and long-continued scheme executed by appellants is massive, documented, and uncontradicted as to any significant element.

The government believes, however, that a statement of facts will be of assistance to the court in the disposition of this appeal. Before setting forth its summary of the scheme to defraud, the government wishes to note that the thin and tenuous nature of the minor assignments of error which appellants have dredged up from the extensive trial record constitutes a definite, if unintended, tribute to the firm, dispassionate and truly judicial manner in which the court below conducted the trial. In this case, the following observation of Chief Judge Lumbard in *United States v. Aviles,* 2d Cir. 1960, 274 F. 2d 179, 194, seems applicable, "the trial judge was eminently fair [to appellants] to the point of being overgenerous."

V.

STATEMENT OF FACTS.

Scope of Scheme to Defraud.

Appellant David Farrell originated the concept of the Secured 10% Earnings Program, placing it into operation in approximately December of 1957, through the corporate entity LATD&ME [R. T. 115; GX 1645]. Though David Farrell controlled and directed the basic policy of LATD&ME, and generally "ran the company" [R. T. 162], appellant Oliver J. Farrell, as vice-president and sales manager, was directly responsible for the method, by which the plan was presented to investors [R. T. 159].

From a modest beginning in December of 1957, LATD&ME, during its two and one-half year existence had entrusted to it by some 9,000 investors approximately $40,000,000.[7] This enormous growth was engendered by a well organized, highly coordinated sales organization maintained throughout California;[8] use of a saturation advertising technique encompassing the placing into the mails of countless thousands of brochures and other selling literature [GX 843; 1150; 1401; 1666; 1667; 1668; 1669; 1670; 1672; 1674] as well as the use of the mass communication media (radio, TV, newspapers) to sing loud the praises of Se-

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[7]As of March, 1958, LATD&ME had entrusted to it more than $5,000,000 of investors' funds; by August, 1959, total dollar volume had grown to more than $20,000,000; when the receiver took over on June 8, 1960, over 9,000 investors had deposited about $40,000,000 under the Secured 10% Earnings Program [GX 649; 846; 1152; 1651].

[8]See *infra*—Role of Oliver J. Farrell in the Scheme to Defraud.

cured 10% Earnings [GX 648; 649; 850; 851; 852; 853; 854; 1151; 1152].

The brochures, other selling literature and advertisements so widely circulated, were designed, without exception, to convey the message that LATD&ME was a long-established, stable and sound financial institution of unquestioned standing and integrity in the financial community, to which all investors, whatever their financial status, could entrust their savings with implicit confidence [GX 843; 1150; 1401; 1666; 1667; 1668; 1669; 1670; 1672; 1674]. This sales presentation was eminently successful, and succeeded in conditioning the minds of investors, residing throughout the United States and several foreign countries, to believe that LATD&ME had developed a new and distinctive plan which assured safety and liquidity of investment, while at the same time furnishing earnings of 10% compounded monthly.[9]

Origin of the Secured 10% Earnings Program.

The appellant David Farrell first started LATD&ME with some five or six salesmen operating out of a small office in Los Angeles, California [R. T. 507]. Initially, its business consisted solely of securing options to purchase trust deeds from individuals, and then attempting to sell these trust deeds at a price in excess of the option price. These, of course, were riskless transactions. If no buyer appeared the option was dropped [R. T. 503-506.] LATD&ME offered no guaranty of the quality of any trust deed and made no undertaking

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[9]See *infra*—"Method of Presentation of Secured 10% Earnings Program to Investors."

to service the trust deed on behalf of the buyer [R. T. 507].

In late 1957 the Secured 10% Earnings Program, as devised by the "fertile" brain of David Farrell, was brought into existence. Its beginning, on a modest scale, was announced through an internal staff bulletin dated December 10, 1957, stating: "Effective immediately a new program shall be promulgated by the Exchange called the 'Secured 10% Earnings Program' . . ." [R. T. 507; GX 1645]. As described by the executive assistant to appellant David Farrell, under the new plan, LATD&ME "purchased trust deeds at discounts from individuals, builders, developers, and sold them to the public on a Secured 10% Earnings Plan that included the assignment of the trust deed and note, and the *complete line of services* from the processing of papers to the vault storage of papers, to the collection and possible repurchase of the trust deed, through to the recording of payments from trustors, home owners, to the liquidation of trust deeds. In other words, *the customer could rely on the company for all phases of handling from the purchase to the sale of the trust deeds.*" (Emphasis added.) [R. T. 114,; also see R. T. 508-509].

Corporate Organizations Involved.

LATD&ME, a California corporation, 87% of whose stock was owned by David Farrell was the center and hub of the Secured 10% Earnings Program.[10] David

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[10]LATD&ME maintained branch or "franchise" offices in San Francisco, Oakland, San Diego, Santa Barbara, Beverly Hills, San Fernando Valley, Pasadena and Orange County, California [R. T. 156, 288]. Contrary to a pretentious letterhead, LATD&-

Farrell was chairman of the board of directors and president of LATD&ME [R. T. 162]. His brother Oliver J. Farrell was a director, vice-president and secretary-treasurer [R. T. 3111-3112]. Thomas Wolfe, Jr. was executive assistant to David Farrell [R. T. 113]. Monroe [Frank] Stark was a vice-president and regional manager of the Northern California branch offices [R. T. 510, 682].

About August, 1959, after the SEC civil suit was underway, LATD&ME "spun-off" its out of state business to TD&MM, a wholly owned subsidiary. TD&MM was a mere department of LATD&ME. An effort was made to establish a separate selling organization in Colorado under the name Colorado Trust Deed & Mortgage Exchange (CTD&ME). This soon became a wholly owned subsidiary of LATD&ME [R. T. 171-173; GX 1653; 1633; 1628].

Although LATD&ME was the center and hub of the Secured 10% Earnings Program,[11] still another organization was superimposed upon the tier of corporations engaged in the administration of the Secured 10% Earnings Program. This was Trust Deed & Mortgage Exchange (TD&ME), wholly owned by David Farrell and his wife [R. T. 151-152]. TD&ME had no employees, performed no useful services, contributed nothing of value to the Secured 10% Earnings Program, but as "national coordinator" of the Secured

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ME did not maintain offices in all "principal cities" [of the United States] [GX 1651].

[11]All the accounting records for all the offices were kept in Los Angeles, and confirmations mailed to customers, trust deed notes, trust deeds, etc., newspaper advertising, brochures and letters, likewise all originated in Los Angeles [R. T. 158, 206, 211; 512-513].

10% Earnings Program received 10% of the gross profits from LATD&ME's business with investors [R. T. 151-152]. Through TD&ME between July, 1957, and March, 1960, David Farrell channeled $542,960 *of funds received from investors* into his own bank accounts and individual enterprises [GX 7807; 7809; R. T. 2613-2616].

During about the same period of time (March, 1958-June, 1960), LATD&ME disbursed to Prestige, Inc., a corporation wholly owned by David Farrell [R. T. 167-168], $599,978 ostensibly for advertising expenses [GX 7805; R. T. 2611-2612].

In addition David Farrell[12] withdrew through Mortgage Insurance Corporation of America (MICA), a Colorado corporation, $293,000.[13] MICA's only other customer was Colorado Trust Deed & Mortgage Exchange, also owned by David Farrell and his wife. Though David Farrell claimed MICA was formed to protect LATD&ME investors, MICA had no assets, liabilities, or dealings of any kind except as indicated above [R. T. 4180-4184 also see R. T. 311-321].

Appellant David Farrell also received $239,000 from LATD&ME as his salary from January, 1958, to June of 1960 [GX 7802; R. T. 2609]. The appellant Oliver J. Farrell received as salary during the same period $251,629 [R. T. 2608-2609; GX 7801].

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[12]David Farrell and his wife owned all of MICA's capital stock [R. T. 4179].

[13]$100,000 "as an inducement" to have MICA insure trust deeds of LATD&ME in California, and $193,000 to MICA allegedly for the insurance [R. T. 4180, 4181].

Description of Secured 10% Earnings Program.

The Secured 10% Earnings Program, as devised and refined by appellants, was based on the concept of acquiring for the inventory of LATD&ME discounted second trust deed or mortgage notes and selling them to investors at prices which it was represented would allow secured earnings of 10% per annum, compounded monthly, based on the stated interest rate of the obligation, and the "anticipated term" of the note [R. T. 716-717; GX 2136; 2137; 2138]. Many of the obligations were without fixed maturities, but merely established the principal sum due, and the amount to be paid monthly until the indebtedness was satisfied. These were known as "until paid notes." Another classification of trust deeds carried definite maturities but with such small monthly installments that heavy terminal or "balloon" installments became due at maturity. Others were "interest only" obligations with the entire principal amount due at maturity. Still others were conventional notes, carrying specified interest rates to be amortized over stated periods of time [GX 1901-1932].

While it was represented to investors that the trust deeds were sold to them at prices calculated to "yield" or "earn" 10%, in fact, in most but not all instances, the formula used by LATD&ME in computing the price at which a trust deed was to be introduced into an investor's account resulted in a substantial overcharge [R. T. 797]. As LATD&ME's "director of trust deed selection" testified, "the longer the period of the note, the greater the overcharge to [the investor] . . ." [R. T. 712, 808]. By this he meant that under the formula used by LATD&ME the yield to the in-

vestor would be less than the represented 10% ". . . Sometimes quite a bit less." [R. T. 797-798]. Thus on a ten year $10,000 note, an investor was overcharged $666, while on a $10,000 "until paid" note, the overcharge was $587 [R. T. 802]. Therefore, from the very inception of his account, the investor was misled as to the basis of the price at which the trust deed was confirmed into his account, and as to the fact that the trust deed itself would really "yield" 10%.

"Earnings" on Uninvested Funds Entrusted to LATD&ME—Estimated Liquidation Statements.

The investors under the Secured 10% Earnings Program fell within two classifications. The first were those known as "income investors," who wished to receive a monthly earnings check representing the mathematical computation of 1/12 of 10% per year, or a lesser fixed amount. The second, and more numerous, were "growth investors," who wished to allow their "earnings" to accumulate for "continuous re-investment" [R. T. 114, 115]. At all times, LATD&ME represented that any new account started, or additional deposit made by the twentieth of the month "earned" a "secured" 10% from the first of the month [GX 846].

Each investor received monthly a "Condensed Summary" of his account, referred to as a "liquidation statement" which *purported* to show the status of the account at month's end.[14] [GX 1223; 1270; Appendix D]. This statement was designed to show the amount

[14]The last column of this statement was originally entitled "Estimated Liquidation Value of All Assets in Your Account." Subsequently, the title was changed to read "Estimated Liquidation Value of All Your Assets in Our Possession."

of money the investor would receive if he decided to withdraw his funds from LATD&ME [R. T. 814-815, 821-822; GX 1223]. As to an investor who was actually receiving monthly "earnings" checks, the summary "cash-out" statement[15] merely indicated that his original investment remained intact. The investor, however, was never advised that any uninvested funds in his account were debited each month by an amount equal to 1/12th of 10% of his deposit as a "miscellaneous charge" against the account, thereby reducing, on the internal investors ledger, the investors credit balance and the corresponding liability of LATD&ME [GX 1100; 1115; Appendix B]. The "cash-out" statement sent to each "growth investor" in essence was merely a projection of the anticipated accumulation of "earnings" for the funds deposited, computed arithmetically with a 10% interest increment each month. This estimated projection bore no resemblance to the actual increment or "earnings" from any trust deeds that might have been introduced into the account [R. T. 814, 817]. For example, an investor who deposited $1,000 with LATD&ME on January 20, would receive at month-end a condensed summary showing that his account had grown to $1,008.33, and by the second month-end to $1,016.73, and by year-end to $1,104.71. The condensed summary translated into specific terms, for each investor, the growth tables set forth in LATD&ME's brochures [GX 842, 843, 844, 1668, 1670; 1674; Appendices C and D].

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[15]All investors were conditioned to regard the "liquidation value" as the immediate cash value of their accounts which they could realize at any time [R. T. 614; 821-822; GX 1403]. That such was actually believed by LATD&ME's customers, see *infra* "Presentation of Secured 10% Earnings Program to Investors."

The "liquidation" statement was sent to each investor regardless of whether his account had ever been invested in a trust deed, and regardless of whether the account contained nothing except delinquent or defaulted trust deeds [R. T. 903-904]. The "liquidation values" shown on the condensed summaries were intended for investors alone. They were designed to assure investors that through LATD&ME's investment plan their savings at all times were accumulating at a safe and steady rate of 10% compounded monthly, or, if the investor was receiving his 10% "earnings" each month, his *full* principal investment was remaining untouched.

There was no correlation whatever between the *actual liquidation value* of the account and the amount shown on the monthly summary, or between the monthly statement sent to investors and the *true internal records* maintained by LATD&ME reflecting the status of investors' accounts [R. T. 814]. These would be reconciled by arbitrary entries made at the time the investor closed his account [R. T. 814-815]. In addition, these "liquidation values" were not reflected in LATD&ME's general ledger [R. T. 2379].

LATD&ME commenced to disburse monthly "earnings" checks to investors who had "income accounts" prior to the time any trust deeds were confirmed to their accounts by LATD&ME [R. T. 1056; 1989]. When such investors withdrew their investments, before trust deeds had been held in their accounts six months or more, LATD&ME deducted the aggregate of the monthly earning checks from the amount of the principal investment, or on "growth accounts" merely returned the principal so that the investor received no

"earnings" whatever [R. T. 486-494; 2200; 3291-3298; 3382]. The deceptive and misleading manner in which LATD&ME accomplished this maneuver is best illustrated by the fact that an attorney, called as a witness by appellants to testify as to his satisfaction with his investment with LATD&ME, admitted that he had not realized, until the moment of his cross-examination, that he had received from LATD&ME only his principal, without any "earnings" thereon [R. T. 3287, 3291-3298].

The appellants' entire lack of good faith in sending the liquidation statements to investors is shown by David Farrell's instructions to the company's "independent" accountant to disregard the "estimated liquidation statement" as meaningless [R. T. 2380], while, at the same time, LATD&ME was mailing notices to all investors advising them that their *taxable income* on "earnings" from their accounts should be calculated by adding up the accruals shown on the twelve monthly summaries which they had received [GX 1403]. Thus, investors were deceived as to the status of their accounts with LATD&ME, while being counselled to regard as taxable income the fictitious accruals shown in the "liquidation statements."

Liquidation of Investors' Accounts and Overstatement of Inventory Account.

When an investor liquidated his account under the Secured 10% Earnings Program, the trust deed[s] in the investor's account would be valued arbitrarily in order to bring the internal ledger account balance into agreement with the liquidation statement balance [R. T. 815]. For example, if an investor deposited $1,000 and LATD&ME sold him a trust deed for $1,400, a debit

balance of $400 was created in the investor's ledger account. If at the time he closed his account, his liquidation statement or condensed monthly summary showed a credit of $1,100, LATD&ME would repurchase the trust deed for its inventory account at a figure of $1,500 so that the credit balance in his ledger account would be $1,100, or the same as shown in the liquidation statement. This was true regardless of the fact that the original cost to LATD&ME of the trust deed may have been only $800. LATD&ME would then send a check for $1,100 to the investor [R. T. 816]. The effect of the repurchase of the trust deed at $1,500 for inventory would be to overstate inventory by $700, since the repurchase price was even in excess of the retail selling price [R. T. 816-817]. There were numerous instances where trust deeds were taken back into inventory above the face value [R. T. 817].

In other instances, where a liquidation request was received from an investor who had delinquent trust deeds in his account, notwithstanding the delinquency, the investor would be paid the full "liquidation value" of the account, as shown on the liquidation statement, including 10% "earnings" compounded monthly. Of course, this situation could exist only as long as LATD&ME had more money coming in than going out. Obviously, LATD&ME would have to write off the difference between the true value of the delinquent trust deeds brought back into inventory and the "liquidation value" of the account [R. T. 915-916]. This was, quite simply, a scheme under which investors who liquidated their accounts were satisfied at the expense of newer investors who continued to pour their savings into LATD&ME.

Misuse of Trust Funds.

LATD&ME represented at least through January of 1959 that investor funds were ". . . deposited in a separate trust account for customers' money . . ." [GX 842, 1666; R. T. 602-603; 1422; 2187-2188]. The facts were, from the inception of the Secured 10% Earnings Program in December of 1957 funds received by LATD&ME were deposited in general corporate accounts and indiscriminately used as dictated by David Farrell. The funds allegedly in "trust accounts" were used, for example, in carrying debit balances in the accounts of "growth" investors and financing David Farrell's numerous speculations in real estate subdivisions [GX 842; 1056-1065; 1068; 1072; 1073; R. T. 2353-2361; Appendix A].

Lag in Introducing Trust Deeds Into Investors' Accounts.

LATD&ME committed itself to credit the account of each investor monthly or at his option to send him an amount equal to 1/12 of 10% of the amount deposited. This commitment existed regardless of the fact that experience had shown the supply of trust deeds available for introduction into the accounts of investors *often lagged behind the accumulation of new deposits by investors for whom no trust deeds were available.* This delay in introducing trust deeds into investors' accounts became an ever increasing problem as millions of dollars in new deposits were received from investors [R. T. 616-617]. The continuing need to find new trust deeds forced LATD&ME to lower its already inferior investment standards. Accordingly, more and more trust deeds were "secured" by raw unimproved land [R. T. 652].

Substantial amounts of investors' funds remained uninvested even after the completion of "crash programs" designed to improve LATD&ME's balance sheet position. During these "crash programs," trust deeds by the thousands, including delinquent trust deed obligations, were introduced into the accounts of investors in order to create ostensible profits to LATD&ME before presentation to the public of financial statements intended to create an appearance of solvency and stability [R. T. 880-882, 900-903; 2366-2369, 2397; GX 2127].

Method of Manufacturing Trust Deeds for Investors' Accounts.

At the inception of the Secured 10% Earnings Program, at least some of the trust deeds acquired by LATD&ME and introduced into the accounts of investors were secured by finished lots within an approved real estate subdivision, and in some instances by owner occupied homes. However, as investors throughout the nation and abroad deposited their savings with LATD&ME in ever increasing amounts,[16] it became necessary for LATD&ME to arrange for the creation of more and more trust deeds in order to absorb investors' credit balances,[17] and to maintain the fiction that investors'

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[16]Investors poured well over a million dollars a month into LATD&ME from late 1958. Over $3,000,000 a month was deposited with LATD&ME during the first five months of 1960 with some $5,266,000 taken in in the month of January alone [GX 846].

[17]For example, even at 10% simple interest, one million dollars of uninvested funds cost LATD&ME $100,000 per year. The seriousness of the firm's financial plight is realized when it is seen that the amount of uninvested credit balances as of October 30, 1958, was $1,216,351; as of June 1, 1959, was $2,468,714; and as of September 25, 1959, was $2,103,426 [R. T. 883; GX 1068; 1072; 1073].

accounts were continuously reinvested to yield a firm, full 10% compounded monthly [R. T. 238, 652, 653].

Appellants met their problem[18] by turning LATD&ME into a medium through which many thousands of trust deeds were created or manufactured against units of raw land situated within projected subdivisions in which David Farrell received "participations" through joint venture agreements or similar arrangements.[19] These trust deeds were created, brought into inventory by LATD&ME, and introduced into the accounts of investors in a wide variety of the most speculative situations[20] [R. T. 386; 713-715; 1739-1740; 2084-2085, 2127-2129].

The trust deeds created against the subdivisions and projected subdivisions[21] carried subordination clauses [GX 1901-1932] under which the trust deeds were to be subordinated to first trust deeds of indeterminable amounts to accommodate the cost of construction of the structure to be erected, and in some instances to cover at least a portion of the cost of "manufacturing" or "finishing" the lots.[22] While in form the trust deeds

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[18]As Oliver J. Farrell wrote in a memo to Frank Stark, May 27, 1959, ". . . we have an ever-increasing problem in getting our customers invested with acceptable Trust Deeds . . ." Farrell then commented on LATD&ME's "severe shortage of suitable small trust deeds to assign to customers" [GX 1634; R. T. 248; 250; also R. T. 616-617; GX 1603; 1621; 1632].

[19]See Appendix A, column entitled "PARTICIPATIONS BY DAVID FARRELL."

[20]See Appendix A, and *infra* "Method of Presentation of Secured 10% Earnings Program to Investors."

[21]Appendix A.

[22]A "manufactured" or "finished" lot is defined as a lot within an approved subdivision where all necessary improvements such as grading, installation of streets, curbing, sewers, and gutters have been completed [R. T. 2093-2095].

so acquired by LATD&ME and introduced into the accounts of its investors were first trust deeds, they were in reality no better than second trust deeds. In some instances they occupied a status even junior to a conventional second trust deed as it was contemplated or a fact that improvement bonds would be created against the subdivision [R. T. 1619, 1622, 1624, 1658; GX 33]. In other situations the trust deeds brought into inventory by LATD&ME were subject to blanket first liens which did not include clauses under which the lien might be removed on a *pro tanto* basis as to individual lots [R. T. 1208-1209].

The funds entrusted to LATD&ME by investors were used in establishing the proposed subdivisions, acquiring the land to be subdivided, and carrying out any engineering and related work that was accomplished in manufacturing and finishing the lots within the subdivision.[23] Typically in these situations the subdivider or builder had no equity in the land which was to be subdivided [see, *e.g.,* R. T. 1266, 1271, 1278, 1299; 1635; 2102-2103], and entered into arrangements with LATD&ME as a last resort after finding it impossible to obtain financing through banks, savings and loan associations, or other conventional lending institutions [R. T. 1321; 1620-1621; 2100].

The basic formula for the creation of trust deeds was simple. David Farrell instructed subdividers that before LATD&ME would commit funds to any project, trust deeds and notes must be created against the property in generally the following way: The subdivider

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[23]Appendix A.

had to have under his control at least two "straw" corporations. These ordinarily were either newly organized or in some cases they were already owned by the subdivider. The subdivider would then acquire from the owner of the property an option to purchase raw acreage at a stated price. An escrow would be opened to arrange for the sale of this land to "X" corporation, one of the subdivider's controlled or "straw" corporations. "X" corporation simultaneously entered into an arrangement to sell the land at a greatly inflated price to "Y" corporation, a second "straw" corporation. The purchase price was not to be paid in cash, but by the execution of individual trust deed obligations which in aggregate face amount, greatly exceeded the total purchase price of the entire tract; "Y" corporation being the "trustor" and "X" corporation the "beneficiary" on these instruments. Contemporaneously with the arrangement between corporations "X" and "Y", a contract was executed under which LATD&ME agreed to "purchase" the trust deeds from "X". The "purchase", although effectuated at a stated discount, was for a total amount which was to (1) cover the subdivider's full cost of the entire acreage to be acquired; (2) provide funds for "servicing" of interest and of principal amortization, as required by the trust deeds for certain periods of time; and (3) purportedly finance "off-site" improvements necessary to "manufacture" lots within the proposed subdivision. Under a typical arrangement LATD&ME would deposit certain monies into the escrow, ostensibly as its purchase price for the trust deeds from "X", where in reality such monies were paid through escrow to the original landowner for the land. Thereafter, the trust deeds would

be assigned to LATD&ME and introduced into the accounts of investors under the Secured 10% Earnings Program at face value or at a discount calculated to bring "10% earnings" to investors [R. T. 1253-1279, 1299, 1302-1320; 1623-1626, 1635-1648; 2086-2101, 2102-2109, 2126-2136; also see Appendix A].

Contemporaneously with the agreement under which LATD&ME was committed to take the trust deeds, David Farrell would exact from the subdivider an agreement under which he was to receive a "participation" of not less than one-third and ordinarily one-half of the total profits that might be realized from the subdivision. These "participation" agreements were entered into by David Farrell in the names of a number of corporations which he owned,[24] a fact not disclosed to investors. In addition to these undisclosed "participations," in a typical situation, not all of the tract of land being acquired by the subdivider was encumbered by trust deeds. The more desirable and valuable tentative lots or sites were left free and clear, and David Farrell and the subdivider thereby obtained clear title to those reserved areas [GX 401; as *e.g.* R. T. 1626, 1641-1642, 1704; 2085, 2113-2114]. The entire cost was borne, of course, by LATD&ME's investors.

For their contribution, investors did not even receive trust deeds constituting valid liens against identifiable lots within an approved subdivision, as the trust deeds were created against mere tentative subdivision maps

[24]These "straw" corporations included Louvan Corporation [GX 212(a); 214], Prestige, Inc. [GX 28], Lincoln Mining Corporation [GX 400; 401], Harris & Steele Builders, Inc. [GX 64, 96]; Lantana [GX 199(a)]; Western Chemical Corp. [GX 250].

[*e.g.* GX 208, 234, 245]. In other situations, trust deeds were created against grid or area maps rather than "tentative subdivision maps." In those instances there was and could be no correspondence whatever between any *future* subdivision and the contiguous units of land against which the trust deeds were manufactured, as not even any tentative provision was made for streets, alleys or other necessary easements. The separate units were totally locked-in [GX 39; 153; R. T. 1693-1694; 2093-2095].[25] The testimony of David Farrell[26] illumines his concern for the welfare of

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[25]Exclusive of trust deeds created against mere tentative maps, LATD&ME created trust deeds and notes against grid patterns totaling at least $1,715,170 in face value. Illustrative of such trust deeds were those created against Cimaron Meadows ($630,768), Scott-Highlands ($320,000), Johnson Ranch ($295,830), and Reedlands No. 5 ($468,572). An example of a "grid" or area map (Scott-Highlands) is shown in Appendix E.

[26]Q. And you knew there was no access, no roads, no sewerage, no provision for utilities in the map, against which you created these trust deeds? You knew that, Mr. Farrell, didn't you? A. I understood there was access.

* * *

Q. Aside from use of an airplane, Mr. Farrell, and parachuting down, what access does the individual have who has a trust deed against this lot marked X?

* * *

A. Mr. Tom Schaal told me that the individual who purchased or acquired a piece of land as part of a number of pieces which were similarly sold to separate owners, had what is known as an easement of necessity over the other land, and that he could not be deprived of getting to these parcels.

* * *

Q. What did you imagine was going to happen, Mr. Farrell, if Mr. Y didn't want to allow Mr. X to come across his land, what did you think Mr. X was going to have to do to get some access to his particular parcel, Mr. Farrell, at the time you created these trust deeds?

* * *

A. I didn't consider that element.

Q. And you never advised the investors about it, did you, Mr. Farrell? A. Not that I know of.

* * *

[R. T. 4161-4162].

investors who received trust deeds covering such locked-in units of land.

An example of the manufacturing of trust deeds in accordance with David Farrell's dictates is shown by the circumstances under which 1,451 trust deeds and notes with an aggregate face value of $1,958,850 were created against a tract of land called Capitol Park Estates, and then introduced into the accounts of LATD&ME investors [GX 208(a); 2127; Appendix A].

William Bennett, a subdivider and builder, had secured an option to buy a 400-acre tract called Capitol Park Estates for a total purchase price of $1,200,000 [R. T. 1321-1323]. Bennett, unable to obtain suitable financing from conventional lending institutions, made an agreement with David Farrell to "manufacture" trust deeds against 355 acres of the tract in return for David Farrell's commitment of LATD&ME funds for the purchase of the land[27] [R. T. 1321, 1325-1326]. Pursuant to David Farrell's directions, Bennett, using a "straw" corporation, Daly-Ben Properties, Inc. (Daly-Ben), purchased the property through escrow from the original owner. In the same escrow Bennett sold the property on paper to another Bennett controlled corporation, Ben-Jay Properties, Inc. (Ben-Jay). Contemporaneously Bennett divided 355 acres of the 400-acre tract into 1,451 residential units and created 1,451 identical trust deeds, each having a face value of $1,350, with Ben-Jay as trustor and Daly-Ben as the beneficiary [R. T. 1329-1332]. The trust deeds were

[27]Prior to David Farrell's advancing any LATD&ME funds he extracted a joint venture agreement from William Bennett, providing each with a 50% interest in the entire 400 acres [R. T. 1339-1342; 1339-1342; GX 212a; 213; 214].

dated January 15, 1960, payable one percent per month including interest and matured five years from date [GX 1920; Appendix F]. Daly-Ben thus received beneficial interest in the notes and deeds of trust as "payment" for the property. The trust deeds were created against a tentative subdivision map of the 400 acres, 45 acres of which remained unencumbered [GX 208]. Daly-Ben then assigned the trust deeds to LATD&ME at a discount of 20% or $1,080 each, or for the aggregate of $1,567,000 with LATD&ME withholding $367,080 from its "purchase price" ($200,000 to be applied in servicing the monthly installments of principal and interest and $167,080 to be applied to off-site improvements) [GX 208(a); R. T. 1334-1335]. Such moneys withheld were set up in accounts designated on LATD&ME's books as "202" accounts. LATD&ME then caused $1,200,000 to be transmitted through escrow to the owners of the property [GX 216; R. T. 1332]. The 1,451 individual trust deeds and notes, each with face value of $1,350, were then placed into the accounts of investors [GX 2127]. This, despite David Farrell's knowledge that his own appraiser had valued the land secured by each individual trust deed at only $666 at the time the trust deeds were created [DF AY].

At this time not even an approved subdivision map had been filed. Estimates indicated some $2,539,000 would be required to finish or manufacture the lots [R. T. 1326]. LATD&ME "withheld" only $167,000 for that purpose [R. T. 1334-1335]. As of June 7, 1960, the entire $167,080 withheld by LATD&ME for "off-site improvements" had been disbursed [GX 214(a)]. However, up to that time nothing had been

accomplished towards creating the subdivision and manufacturing the lots except some minor engineering work [R. T. 1348]. Notwithstanding the gross inadequacy of the money "withheld" for improvements, David Farrell and William S. Bennett misappropriated at least $123,280 of the $167,000 allegedly "withheld" for improvements in the following manner: (1) the sum of $103,071 was disbursed from the "202" account to liquidate a mortgage on 13 lots in Westgate Park, California, which were owned by Farrell and Bennett [GX 214(a); R. T. 1348-1349], and $20,209 was disbursed from the "202" account to liquidate a mortgage on certain land in Sunnyvale, California, owned by Ben-Jay. Farrell and Bennett at that time each owned 50% of Ben-Jay [GX 214(a) and (b); R. T. 1350].[28]

Screening and Appraisals of Trust Deeds.

What LATD&ME Said:

Investors were led to believe that LATD&ME brought into inventory, under the Secured 10% Earnings Program, only "seasoned", "prime", and "trouble-free" trust deeds, and that all trust deeds sold to them had been carefully screened and appraised by real estate specialists and expert appraisers. Investors were also led to believe that all such trust deeds were secured by

[28]As shown by Appendix A, similar misappropriations of funds totaling $207,000 occurred in connection with trust deeds created against Suisun and Pierce Gardens [GX 197; 197(a), 197(b); R. T. 1223-1227]; and the sum of $88,094 misappropriated from the "202" account established in connection with the creation of trust deeds on College Center [GX 205(a); 206; 219; R. T. 1313]. David Farrell and William S. Bennett were joint venturers in these situations [GX 197].

substantial underlying homeowners' equities. For example, the white brochure [GX 1666], described LATD&ME's method of selecting trust deeds in the following terms:

> "BECAUSE WE ARE THE OLDEST AND LARGEST institution of this type in America, all types of notes secured by trust deeds are offered to us in tremendous volume. These notes all go over a 'screening desk'. The very best of these notes are then carefully processed to determine the value of the property. . . ."

The description continues:

> ". . . You will note that we do not act as your agent but as principal, first purchasing these notes with our own funds after careful screening and investigation. You can thus be sure that we investigate thoroughly."

The later brochures [*e.g.* GX 843; 1667] contained a substantially identical description of the quality of the trust deeds offered to the investors, together with the following information under the heading "STANDARDS and POLICIES. . . ."

> ". . . YOUR SECURITY . . . THE AMERICAN HOME . . . BEST IN THE WORLD"
>
> "Regardless of position, each trust deed purchased by the company for subsequent resale to any customer is carefully screened, the property appraised, and the following standards observed:
>
> · A first trust deed cannot normally exceed 80% of what our appraisers determine to be the fair resale value of the property.

> · A second trust deed must (except in unusual cases) be subordinate only to a 'conventional' bank, savings and loan, or insurance company first trust deed, . . . and the total of the two liens, both first and second, cannot under most circumstances exceed 85% of the resale value of the property as determined by our appraisers.
> . . ."

Further, in the January, 1959 issue of "Trust Deed Topics", a monthly publication circulated by LATD&ME [GX 846], the following statement is made with reference to "typical" raw land developments involving trust deeds purchased by LATD&ME:

> ". . . Before Trust Deed and Mortgage Exchange makes such an investment, our appraisers must know the neighborhood involved, its probable future and be certain that property values in the area are sufficient to warrant the investment."

What LATD&ME Did:

Thomas Graham was called by appellants as their real estate appraiser [R. T. 3619]. He testified that his appraisals on improved land generally would be accomplished at the rate of "four houses a day," whereas unimproved "tracts," would be at the rate of one or two per day ". . . depending on the location and how difficult it was to find comparables" [R. T. 3625]. In most cases his tract appraisals were at a valuation "subject to improvement" [R. T. 3649], and his instructions from LATD&ME were that ". . . they wanted it per lot value when improved or an acreage value." [R. T. 3650].

Graham testified that "comparable sales,"[29] are helpful because "That helps to establish the market value. It is one point toward establishing the value of the property that you are appraising." [R. T. 3650]. He further agreed that an ". . . actual recent sale on that particular piece of property" would certainly be very helpful in arriving at an accurate fair market figure, and would necessarily have to be taken into consideration; but he would have to first check such a sale out to determine if the property was sold under the market value if distressed, or over the market, because of favorable terms or the existence of a subordination clause [R. T. 3651].

Despite the importance of these criteria, when cross-examined about several raw land subdivisions which he appraised, and which were the security for trust deeds "purchased" by LATD&ME, he had neither investigated nor had he been told by David Farrell (or anyone else) of then pending escrows through which the developer was purchasing the tracts or the actual purchase price.[30]

The promotional nature of these appraisals, and the fact that these were not meant to show actual value of the tract in its then existing condition, *but only what*

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[29]*I.e.* ". . . Sales in the same or similar areas that have actually been made that I consider comparable in value to this particular parcel" [R. T. 3650].

[30]See examples: R. T. 3657-3659 *re:* Bell Canyon Ranchos; R. T. 3667-3668 *re*: Palm Springs Alpine Village. Nor do DF-AI, M. E. Manseau's appraisal on Tract 24153, Pacoima, California; DF-AW, Graham's appraisal of Tract No. 3429, Huntington Beach, California; or DF-AY, Carpenter's appraisal of Capitol Park Estates, Sacramento, California, etc., indicate that such criteria were known or considered by the LATD&ME employed appraisers.

it might be worth if and when the subdivision was created and the lots finished, is apparent from their contents. It is also apparent that even the inflated promotional values were in some instances *far below the aggregate face value of the* trust deeds that were created against the "tentative lots" within the tract. That investors did not receive their "margin of security," as represented in all of the brochures, is obvious. The following are examples of such situations.

(1) Exhibit DF-AY—Walker W. Carpenter's[31] appraisal of February 2, 1960: "1451 R. 1 Lots 400 acres, . . . Capitol Park Estate, Sacramento (County), California."

The appraisal indicated the following information:

> ". . . An active sales campaign would be required to dispose of the lots . . . subject is undesirable because of the approach from the city . . . Improvement costs will run high for subject lots because of the high water table. . . ."

and, that realtors valued the lots "when completed, at $3,000 each." The appraiser's conclusions, as to valuation per "tentative lot" were:

"Raw land ($3,000 per acre)	$ 666.00
Est. Improvement cost	1750.00
	$2416.00
Contingencies and Profit	603.00
Total	$3,019.00

Based on the analysis of the above, *it is my opinion that Fair Market Value of Subject Lots, when improved will be . . . $3000* per lot."

[31]Walker W. Carpenter was one of Graham's "trainee" appraisers [R. T. 3677].

With this appraisal already completed, on February 10, 1960, LATD&ME brought into inventory 1451 trust deeds, each having a face value of $1350.00, or an aggregate face value of $1,958,850 there being no improvements nor subdivision map of record at the time [GX 208; 208(a)]. Each trust deed was "security" for a "lot," then appraised at a value of only $666.00; an overvaluation on each trust deed of $684.00 *over their own appraisal.*

(2) Exhibit DF-AZ, Weeks' extensive appraisal of "Tracts 1078, 1079, and 1274,"[32] dated September 1, 1959 contained the following information:

". . . the market value of these properties as of 9-1-59 is as follows:

Tract 1078		$1,174,600
Tract 1079		197,250
Tract 1274		63,550
	Total	$1,435,400"

Weeks rounded that figure to "$1,435,000", and stated that his conclusions were predicated upon certain "limiting conditions," which included the following:

". . . 6. That the proposed land improvements affecting Tract 1078 will be installed: ". . . land improvements consisting of:

1. Street paving,

2. Gas, water and electric services available to each lot.

3. A permanent storm drain along Lot F and C, be installed and all costs be paid by the developer."

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[32]This is the "Villa Nipomo" tract located in the Saugus-Newhall, California, area [R. T. 3678-3680].

Weeks included a series of photographs at the end of his appraisal, including picture "no. 6," which showed ". . . the present condition of wash in North part of Tract 1078"[33]

Despite this appraisal information, LATD&ME "purchased" 2139 trust deeds, created via the "straw" corporation, "purchase money" method, on *portions* of tracts 1078, 1079 and 1274. These trust deeds had an aggregate face value of $1,982,075 [GX 94 and 99], despite the fact that *all* of 1078, 1079, 1274 *and* 1801 had simultaneously been purchased by Villa Nipomo, Inc. from Los Angeles Home Company for a total purchase price of $810,000, the exact value the stockholders of the seller placed on the entire tract [R. T. 2035, 2038-2039, 2041, 2077].

Examples of how grossly these 2139 trust deeds were over-valued, may be seen with the following comparisons to their own appraisal [DF-AY]. A total of 16 trust deeds were created against Lot 9, Block 205, Tract 1078, each having a face value of $1400 and each being confirmed to an investor's account (including that of witness Eppley). The aggregate face value of the 16 trust deeds, $22,400, is fantastically higher than was Weeks' *"if and when"*

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[33]See Robert Rosskopf's testimony, he being the attorney for Los Angeles Home Company, the original seller of the tract to Villa Nipomo, Inc., for his description of the property [R. T. 2040-2041, 2045, 2047].

Curiously, when LATD&ME's Graham appraised Tract 1078, he did not even know there was a wash problem although he testified that he considered " . . . the probability of being able to dispose of it for industrial sites. That is what they proposed, I believe, to make an industrial subdivision of it. And I questioned whether or not they would be able to put it over on any reasonable basis, because I thought there was too much of it for an industrial district" [R. T. 3679-3681].

appraisal of $6,000 for *the entire lot* [GX 10076];[34] which amounts to approximately $428.60 "security" for each $1400 trust deed.

(3) Exhibit DF-AH, Graham's appraisal of Bell Canyon Ranchos, in conjunction with his testimony reveals the following information:

Both appraisal and testimony indicated that there would be development problems with this property, because of steep hills, necessity of "building pads," and water problems [R. T. 3664].

Graham spent only "a couple of hours" on this appraisal, and no one, including David Farrell, told him that the tract was in escrow at that time at a sales price of $3421 per acre. Nor did he investigate to determine such information prior to appraising the entire 176 acres at $7,000 per acre [R. T. 3658-3662].

Graham testified that it would cost about $2200 per acre to develop this tract, and that approximately three lots could be developed per acre [R. T. 3664-3665].

Despite this information, LATD&ME brought into inventory 302 trust deeds created against only 86 of the 176 acres [R. T. 4213], each having a face value of $4,000, or an aggregate of $1,208,000 [GX 245; 246]. According to Graham's analysis, with three lots per acre, and the acre valuation being $7000, each *lot* would have an appraised "fair market value" of only

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[34]To the same effect see for example GX 10063, indicating 16 trust deeds and notes with an aggregate face value of $22,400 encumbering a lot appraised by LATD&ME's own appraiser at $6,000; GX 10064 indicating 8 trust deeds and notes with an aggregate face value of $11,200 encumbering a lot appraised by LATD&ME's own appraiser at $3,000.

$2,333.[35] Comparing this value with the $4000 trust deeds against each of such lots, there was an aggregate appraised value of $704,566 to support $1,208,000 in trust deeds.[36]

Adding further depth to this indefensible conduct, knowing that a total of $664,400 would be needed to improve the 302 "lots," LATD&ME "withheld" only $149,999 in its "202 account" for "improvements." [GX 246, 260(d)].

(4) Exhibit DF-AV, Graham's appraisal on Palm Springs Alpine Village.

In the appraisal, Graham noted that the 653 lots on 680 acres, covered raw land, there being no improvements, and no zoning yet obtained, and concluded, ". . . my opinion that subject lots, *when improved* will have an average Fair Market Value of *$2900* per lot."

In his testimony Graham stated that the raw land, in its then unimproved state, was worth only $62 to $100 per lot, and that his appraisal was based on consideration of the improvements that would be made in the future [R. T. 3671-3674].

Graham further testified that he did not know that 3800 acres was about to be released for a total of $212,000 (which *included* the 680 acres he appraised), nor that that sale was finalized within 20 days of his appraisal [R. T. 3667-3668].

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[35]Even this assumes all improvements would be completed at a cost of $2,200 per lot.

[36]The difference becomes even more monstrous if the $2,200 per lot were deducted from the $2,333 "fair market value."

This property was encumbered with 653 trust deeds, each having a face value of $1200 or an aggregate face value of $783,600 [GX 393(a); 405].

(5) Exhibit DF-AW, Graham's appraisal: "Subject Tract No. 3429 — Land Appraisal, Huntington Beach, California. For: David Farrell".

This appraisal, dated 9-24-59, disclosed the following information:

> "The entire area is farm land. It is about 1 mile to the nearest urban development and that is scattered and minimum construction. . . . 1250 raw land cost per lot. . . . Improvements in this area cost about $1500 per lot, making a cost of $2750 per lot. Counting costs and profits yields a value of $3500 . . .
>
> *It is therefore my opinion that subjects lots will have a market value of $3500 when manufactured.*"

A total of 186 trust deeds was placed against this property, each having a face value of $3150, in the name of "Cal-State Investments" [GX 416]. The aggregate face value was $585,900. The trust deeds were "purchased" by LATD&ME on 11-16-59 [GX 416].

Graham testified that the raw land here was appraised at only $1250 per lot, and would not at that time, have sustained an encumbrance of $3100 per lot [R. T. 3675-3676].

Misappropriation of Investors' "Windfall Profits."

Throughout the Secured 10% Earnings Program, it was represented to investors that in the event the trustors or makers of trust deed notes held in investors' portfolios should liquidate their obligations in advance of maturity, such investors would "earn" more than the promised 10% as a consequence of their ownership of the obligations being liquidated [R. T. 716-717; GX 2136-2138]. Indeed, in the first stage of the Secured 10% Earnings Program, LATD&ME did credit the investor with the full amount received in connection with such advance liquidations or "pay-offs" [R. T. 917-918]. This uncharacteristic policy of honest treatment did not continue for long and was soon revised. Early in 1959, without any notification to investors, the entire accounting procedure was changed. Thereafter, when LATD&ME received notice from the escrow holder that a trust deed note was to be paid off in full in advance of maturity, LATD&ME simply notified the investor that the trust deed was being repurchased ". . . according to our regular procedure whenever further action is required." [GX 695]. The trust deed was then withdrawn from the investor's account, which was credited only with the original cost of the trust deed, less any amount theretofore paid by the trustor to apply on principal. LATD&ME then proceeded to collect the full amount through the escrow, and retained the difference between the amount credited to the investor and the amount received from the trustor. For example, when a trust deed note bearing 10% interest was paid off in advance of maturity, the investor

was credited with the *current unpaid balance* of the note while LATD&ME received not only the current unpaid balance, but all accrued and unpaid interest. LATD&ME retained these interest accruals [R. T. 917-920]. In these situations the amount received by LATD&ME after withdrawing the trust deed from the investor's account always exceeded the amount credited to the investor [R. T. 2746].

A single example will serve to illustrate this technique used in manipulating investors' accounts. On March 20, 1959, LATD&ME purchased TD No. 7195M for inventory for $3,274 [GX 698], and on May 1, 1959, confirmed it to the account of W. A. Griswold for $4,112 [GX 699]. About August 4, 1959, LATD&ME was notified by Bank of America that the trustor had opened an escrow in order to liquidate the obligation evidenced by the trust deed. Bank of America requested LATD&ME to forward the documents required to accomplish reconveyance [GX 709]. On August 20, 1959, LATD&ME sent the instruments of reconveyance to Bank of America, together with instructions that the unpaid balance on the note, together with accrued interest amounted to $4,377 plus interest [GX 711]. On September 8, 1959, the bank sent its check for $4,459 to LATD&ME [GX 710]. *The next day,* September 9, 1959, LATD&ME advised the investor that it was "necessary to withdraw" the trust deed from his account, in accordance with "our regular procedure whenever further action is required" [GX 712]. *Nine days later,* on September 18, 1959, the investor's ledger account was credited with $4,027 [GX 696]. Thus, in this situation, LATD&ME, "in accordance

with [its] regular procedure" misappropriated $432 belonging to the investor.

There is set out in Appendix G a schedule [GX 1893] showing similar manipulations of investors' accounts and the misappropriation by LATD&ME of "windfall profits" which should have accrued to investors. The schedule which covers 50 accounts reflects the misappropriation of amounts as small as $22 and as large as $770. The average is $170 [R. T. 2746].

"Big Board" or "Open Market" Trading.

The brochures describing the "Secured 10% Earnings Program" credited David Farrell with ". . . creating an entirely new industry when he originated 'big board' and 'open market' trading in trust deed investments . . ." [GX 843; 1667; 1668; 1669; 1670; 1672; 1674]. Through the "big board" and "open market" trading, LATD&ME professed to offer investors an "exchange," similar to a national securities exchange, which would effectuate ". . . a 'stabilization policy' relative to such notes and purchases . . . at prices above those normal in the market" [GX 1666]. LATD&ME salesmen used impressive photographs and brochures stressing the significance of the "big board" in stabilizing the trust deed market [GX 843; 1401; 1666; 1667; 1668; 1669; 1670; 1672; 1674; R. T. 539-542].

In fact, the "big board" had nothing to do with the "Secured 10% Earnings Program" and its sole function was to mislead investors into believing that trust deeds introduced into their accounts could be liquidated at any time through LATD&ME's trading facilities [R. T. 539-542, 697; also see *infra* "Role of Oliver J. Farrell in Scheme to Defraud"].

Misrepresentations as to Liquidity.

LATD&ME, stressing their financial liquidity, represented to investors they ". . . maintain a financial liquidity (cash to total liabilities) higher than most of the banks, savings and loan associations and security brokers" [for *e.g.,* GX 843]. This representation was false as evidenced by an analysis of LATD&ME's financial position at a number of dates computed in accordance with the "net capital" rule promulgated by the SEC, and applicable to brokers and dealers in securities [GX 1055; R. T. 2669-2670]. In general, the "net capital" rule requires brokers and dealers to maintain cash or other *liquid assets* of not less than one dollar for every twenty dollars of aggregate indebtedness. In computing the value of "liquid assets" held by brokers and dealers, the rule requires that securities held in inventory be reduced by thirty percent of current market value in order to accommodate downward changes in market prices [R. T. 2662-2670]. It was emphasized the rule establishes the *minimum* standard of liquidity [R. T. 2642-2643].

LATD&ME at no time maintained liquid assets sufficient to satisfy the minimum requirements applicable to brokers and dealers in securities. On the contrary, as evidenced by computations found in Appendix H [GX 1055; R. T. 2669-2670], after the most generous allowances for the value of trust deeds in inventory (including those in default and in process of foreclosure), LATD&ME's financial condition, computed in accordance with the "net capital rule," was in continuous deficit.

Concealment From Investors of the True Nature of the Civil Litigation With Securities and Exchange Commission.

From March 24, 1958, until June 8, 1960, when the receivership was established, appellants sought to conceal from investors the fact that the Securities and Exchange Commission had brought the entire Secured 10% Earnings Program into serious question with a suit which, among other things, alleged appellants were engaging in a course of business which constituted a fraud and deceit upon members of the investing public. This deliberate policy of concealment continued even after October 8, 1958, when the SEC amended its original complaint to include allegations of insolvency, misappropriation of funds of Secured 10% Earnings investors and requested the appointment of a receiver [GX 1432].

Notwithstanding the grave nature of the charges made by the SEC and the shadow of receivership that hung over the enterprise, the brochures, *without mentioning the civil action,* assured investors that:

> "Legal aspects of our Secured 10% Earnings Accounts have been evaluated and approved by counsel for the company, Mr. Morgan Cuthbertson, former counsel for the Securities and Exchange Commission." [GX 843; 1667].

Mr. Cuthbertson characterized this statement as a misrepresentation, and denied that he had ever evaluated or approved the legal aspects of the Secured 10% Earnings Program [R. T. 3491-3492].

The appellants not only concealed from investors the very existence of the charges, but if a question was raised by an investor regarding the nature of the litigation, salesmen were instructed to state that the sole question was "jurisdictional." As Oliver J. Farrell instructed all personnel handling correspondence for Trust Deed & Mortgage Exchange:

> *"What's With The SEC?*
>
> The civil suit now pending in connection with the Securities and Exchange Commission, is simply an airing of our Secured 10% Earnings in order to get the ruling by a Federal Court as to whether or not we are selling securities which require a registration . . ." [GX 2102].

The appellants' policy of misrepresenting the nature and status of the civil suit and the findings of the courts reached its apex immediately after this court had reversed the preliminary decree entered by the district court, *Los Angeles Trust Deed and Mortgage Exchange v. S.E.C.*, 264 F. 2d 199 (9th Cir. 1959). The March, 1959, issue of Trust Deed Topics [GX 846] contained a grossly distorted, truncated and misleading summary interpreting the reversing opinion. [Appendix I.]

Thus, until the very moment the receiver intervened, investors trustingly deposited their savings with LATD&ME in entire ignorance of the very existence of the serious allegations made by the SEC and the impending receivership. For example, on May 26, 1960, six days after the district court entered its final decree, appellant David Farrell, sent a letter welcoming Laddie J. Stewart, a serviceman stationed abroad, to "our large family of customers." [GX 586].

Insolvency of LATD&ME.

LATD&ME's investors were misled by the company's slogan that: "No Secured 10% Earnings Customer has ever sustained a loss" [GX 842; 843; 846; 1668; 1670; 1674]. The eventual realization of losses was continually postponed by the very nature of the scheme to defraud. Investors were persuaded to take their "Secured 10% Earnings" on paper, leaving their actual cash in the hands of the company. As soon as LATD&ME's source of fresh funds was exceeded by the cash outflow for "secured earnings" and the honoring of liquidation requests, appellants' financial empire collapsed.

As of March 31, 1959 LATD&ME was insolvent in a bankruptcy sense, in the amount of $176,000 [R. T. 2670-2682; GX 1054; 1074; Appendix J]. By June 7, 1960, the day before the receiver took over, the excess of total liabilities over total assets had grown to at least $1,250,000 [R. T. 2840, 2843, 2844, 2849, 2854, 2859-2861; GX 6005; Appendix K].

In addition, of $39,000,000 in trust deed notes which LATD&ME held for servicing for investors, 2717 totaling $8,500,000 in face value were delinquent [R. T. 2779-2780, 2809-2811; GX 6001(c); Appendix L]. These $8,500,000 delinquent trust deeds did not include the 13,700 trust deeds totaling $17,000,000 in face value which were being serviced as to interest and principal from "202" accounts established by LATD&ME at the time the trust deeds were created [R. T. 2803, 2804, 2864-2867; Appendix A]. LATD&ME's actual cash on hand when the receiver took over was over $2,000,000 short of that necessary to cover the $2,367,000 in book

entries credited on the corporation books as "withheld" money to service the trust deeds and notes [R. T. 2866-2868].

LATD&ME had pending, *prior* to receivership some 800 customer demands for liquidation of accounts totaling $3,600,000 which had not and could not be honored R. T. 2801, 2867-2868; GX 6002; 6003].

Method of Presentation of Secured 10% Earnings Program to Investors.

The appellants instructed all personnel of LATD&ME to so present the Secured 10% Earnings Program to the investing public that they would rely completely on LATD&ME's financial stability and liquidity. LATD&ME salesmen represented to some investors that LATD&ME was a financial institution similar to a bank or savings and loan association [R. T. 1024; 1108; 1156; 1845]. Others, and perhaps the majority of investors, were led to believe that they were making deposits into an integrated investment program under which LATD&ME provided a safe, stable and liquid investment together with 10% earnings, and, in addition, their accounts would be secured by prime, trouble free and seasoned trust deeds [R. T. 1039; 1408-1409; 1529-1532; 1811; 1974-1979; 1988-1993; 2003-2007; 2188; 2258]. Thus, investors were induced to believe that LATD&ME was basically a bank-like institution [R. T. 764-765; 1024; 1108; 1156; 1836-1837; 1845; 1907-1909]. They were told they could withdraw their funds just as they could from a bank [R. T. 1156; 1845], and were led to understand that LATD&ME "guaranteed" their accounts in a manner similar to insured bank deposits [R. T. 1907-1909], and that

LATD&ME "guaranteed" 10% earnings [R. T. 1024; 1107; 2176]. Investors were given LATD&ME passbooks, resembling bank savings account passbooks, in which their deposits were recorded [GX 621; 866; 1221; 1259; R. T. 1024; 1845]. Some investors were confused and uncertain as to the relationship of trust deeds to LATD&ME's Secured 10% Earnings Program [R. T. 1109-1110; 1155; 1800; 1837; 1849; 1869-1870]. They were not told that they were buying trust deeds [R. T. 1108; 1800; 1837; 1849; 1869-1870; 1882] but on the contrary, were led to understand that they were depositing their funds with LATD&ME, who, in turn, was investing in real estate and trust deeds [R. T. 1108-1110; 1154; 1795; 1869-1870; 1889]. Investors, falling within this category, often did not want to purchase trust deeds or similar instruments [R. T. 1108; 1800; 1837; 1849; 1869-1870; 1892]. Nevertheless, they were induced to withdraw funds from nonspeculative savings media, such as banks, savings and loan associations and life insurance companies [R. T. 1010; 1159; 1835-1836; 1846], in order to invest in what was represented to them to be an equally safe and secure financial institution [R. T. 1011; 1153, 1156; 1836; 1845].

The misunderstanding that LATD&ME was like a bank was fostered, in no small way, by LATD&ME's bank-like appearance[38] and salesmen's frequent compar-

[38]LATD&ME intentionally created confusion in the minds of investors by leading them to believe that the institution was similar to a bank as evidenced by David Farrell's instructions to employees of LATD&ME's main office that they endeavor to create a "bank-like" atmosphere [R. T. 156-157]. These instructions were apparently well carried out since investors visiting the main office observed the bank-like atmosphere so created [R. T. 1163; 1413].

ison of the company with a bank. Salesmen utilized such language as: an investment with LATD&ME was "As safe as money in the bank . . ." [R. T. 1836]; ". . . was a better risk than the California Bank . . ." [R. T. 1533]; ". . . As safe as any bank." [R. T. 1961]; and ". . . just as if it were down at the corner bank" [R. T. 1976].

Many of LATD&ME's investors were cognizant that the purchase by them of trust deeds constituted an essential element of LATD&ME's integrated investment program [R. T. 1043; 1140-1142; 1408-1409; 1528; 1811; 1923-1924; 1974-1979; 1988-1993; 2187-2188; 2258]. These investors believed that they were investing under a program offered by LATD&ME [R. T. 1098; 1408-1409; 1546-1547; 1811-1812; 1961; 1974-1976; 2187-2188], and looked to LATD&ME to select safe and secure trust deeds [R. T. 1039; 1041; 1141; 1411, 1417, 1422; 1530-1531; 1975; 2258-2259]; to provide essential services in collecting and servicing trust deeds, and to provide professional management over their accounts [R. T. 1098; 1413, 1417, 1422; 1537, 1546-1547; 1961; 1991-1992]. They looked to LATD&ME, and not the trust deeds in their accounts, for the secured 10% return [R. T. 1962; 2281]. They were also led to believe that in addition to the security provided by the trust deeds in their accounts, LATD&-ME stood behind their investments [R. T. 1408-1409; 1537; 2189-2190].

One investor witness testified about the following analogy, which was related to him by a LATD&ME salesman [R. T. 1408-1409], and later repeated by David Farrell [R. T. 1418-1419]:[39]

> ". . . he compared their operation, that is, the LATD, to a double-hulled ship. He said the outside hull is the company; the company stands behind your investment, and any time you want you can cash it in. And that is not all: There is an inner hull, a safety hull. That is the property itself. That for this particular program we pick good properties, and your investment will be protected by them even if the company was not in existence." [R. T. 1408-1409].

LATD&ME salesmen represented to investors that the company's Secured 10% Earnings Program included only sound and secure trust deeds; that LATD&ME invested in "seasoned deeds of trust" [R. T. 2188]; ". . . bought nothing but the best . . ." [R. T. 1926]; ". . . made very sound investments . . . nothing speculative . . ." [R. T. 1041]; ". . . the trust deed was amply covered by an excess in valuation of the property . . ." [R. T. 2259];[40] ". . . men go out and appraise the property, and that if it was a good risk they bought them in, and if it wasn't, they refused them" [R. T. 1531].

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[39]David Farrell represented to this investor that he would personally approve the selection of trust deeds for his account [R. T. 1417-1418]. Nevertheless, LATD&ME failed to withdraw delinquent trust deeds from the investor's account [R. T. 1465], and even introduced trust deeds into the account which were already in default [GX 764; 1186].

[40]Compare with section in this brief relating to LATD&ME's appraisal policy, entitled "Screening and Appraisals of Trust Deeds."

Based on representations made to them by the salesmen, and the concept of "the American Home" as security [GX 842; 843; 844; 992(b); 1668; 1669], numerous investors were led to believe that trust deeds selected for the Secured 10% Earnings Program were secured by owner-occupied homes, apartments or other buildings [R. T. 722, 725; 1041; 1535; 1923-1924; 1991; 2188; 2756]. Many were disillusioned, and after examining some of the tracts against which their trust deeds were created noted that "It was just a piece of desert right next to the mountains . . . No streets . . . No stores around. Just dirt roads" [Tract 1078—Newhall, California, R. T. 1966-1968]; ". . . It is a vast area, sloping hillside, all covered with brush; nothing developed whatsoever . . . No roads whatever . . . Nothing had been done. It was a wilderness, the way it had been for years." [Reedlands Unit No. 5, R. T. 1877-1879]; "A bare field" [Capitol Park Estates, R. T. 1931-1932]; and "Very, very sparsely settled. As a matter of fact, no houses could be seen from the place where my lot was situated" [Palm Springs Alpine Estates, R. T. 1981-1983]. Other investors ultimately discovered that the trust deeds introduced into their accounts by LATD&ME had been created against grids without any means of ingress or egress; they described the property in the following terms ". . . we were in the center of a piece of property to which we couldn't get in or out; and that it was a very small thing that was absolutely worthless" [R. T. 2285].

LATD&ME mailed out to investors an instrument designated as "Confirmation" or "Program Sell Order & Confirmation," which purported to confirm to in-

vestors the sale to them by LATD&ME of trust deeds and to give a very brief description of the underlying trust deed security [GX 788; 796; 867(a)]. These confirmations failed to fully describe prior liens [GX 788; 796; 867(a); R. T. 1484-1493; 1557-1558]; stated falsely that homes and buildings were being constructed [GX 869(a); R. T. 1565-1566] and contained other incomplete and inaccurate descriptions [R. T. 1462-1463; 1575-1577]. On the basis of such confirmations, investors were asked to accept or reject the trust deeds [GX 1668, p. 10]. Salesmen of LATD&ME, when asked by investors regarding individual trust deeds, replied with spurious information, such as stating that buildings were being constructed, when, in fact, there was nothing but a vacant parcel of land [R. T. 1565-1566, 1578-1579]. Moreover, investors were led to believe that it was not necessary for them to inspect the property on which they were assigned trust deeds as they could depend on LATD&ME's skilled staff to make sound selections [R. T. 1431; 1975-1976; 1991-1992]. That investors did so rely on LATD&ME's expertise is evidenced by the very low rate of rejection of trust deeds introduced into their accounts [R. T. 255; 614; GX 1623].

Investors also relied upon the statement in LATD&ME's brochures [GX 842; 843; 844; 992(b); 1668; 1669] that the total value of the first and second deeds of trust ". . . cannot under most circumstances exceed 85% of the resale value of the property as determined by our appraisers" [R. T. 1529-1530; 1925; 2189]. Although investors were informed both by the salesmen [R. T. 1923; 2189; 2267] and through

the sales literature [GX 842; 843; 844; 992(b); 1668; 1669], that it was the policy of LATD&ME to replace defaulted or delinquent trust deeds with trust deeds of good standing, delinquent trust deeds were not withdrawn from the accounts of investors [R. T. 1099; 1176-1177; 1465; GX 515; 764; 817]. It was further the policy of LATD&ME to encourage investors to have the company retain title in the name of LATD&ME, as "Trustee", so as to facilitate the processing and possible liquidation of the trust deeds [R. T. 205]. Investors were thus kept in ignorance of LATD&ME's internal accounting procedures,[41] and could not, and did not know whether specific trust deeds assigned to their accounts were being kept current. In some instances, trust deeds which were already in default were introduced into the accounts of investors [GX 764; 1186].

The confirmations mailed to investors to confirm the sale to them of trust deeds contained the notation "Balance on Terms" which indicated the amount by which the investors was still indebted to LATD&ME for the specific trust deed; LATD&ME considered and treated this debit balance as a demand obligation owed to it by investors [R. T. 2406]. The investors, however, were not made aware of the fact that LATD&ME considered these items as demand obligations. Many investors were not ever aware that the designation "Balance on Terms" indicated that they were indebted to LATD&ME in any manner whatsoever [R. T. 1063-1064; 1118; 1168-1169; 1837; 1854; 1873; 2018].

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[41]Appellants stipulated at trial that none of the investors saw the internal records of LATD&ME [R. T. 1125-1126].

The very core of the Secured 10% Earnings Program and the factor which catapulted the program into wide acceptance, was the mailing to investors, monthly, of condensed summaries [GX 1270; Appendix D], graphically portraying the growth of investors' accounts through 10% interest compounded monthly. The investors understood the figures in the right-hand column of this summary— "Estimated Liquidation Value of All Assets in Your Account", as representing the total of their deposits combined with the 10% earnings therefrom [R. T. 775; 1122; 1164-1165, 1175; 1801; 1838-1839; 1855; 1902; 1930; 1963; 1984; 1994-1995; 2179; 2198; 2279]. All investors, regardless of their understanding of the Secured 10% Earnings Program, accepted the summary as proof that their funds were in fact earning 10% [R. T. 775; 1122; 1164-1165; 1175; 1801; 1838-1839; 1855; 1902; 1930; 1963; 1984; 1994-1995; 2179; 2198; 2279]. They believed that the amount shown represented LATD&ME's total indebtedness to them, which was due and payable whenever they elected to liquidate their accounts [R. T. 775; 1801; 1930]. The condensed summary, showing the growth of the account, influenced investors to add further funds to their accounts [R. T. 1930; 1994-1995].

Investors were told by salesmen that LATD&ME would promptly fulfill requests for the complete, or partial, liquidation of customer accounts [R. T. 1012-1013; 1110; 1139-1140; 1156; 1408-1409; 1531; 1812; 1845; 1868, 1888, 1890; 1993; 2008; 2756]. The represen-

tation as to liquidity was unequivocal and without the qualifying caveat that LATD&ME would effect liquidation only on a "best efforts" basis [R. T. 1419; 1845; 1890].[42]

Even after the decision of the district court on May 20, 1960, appointing a receiver, salesmen continued to represent that liquidation could be accomplished ". . . within a day or two or three, at the very most . . ." [R. T. 1013]; as soon as the investor ". . . would write into the company . . ." [R. T. 2756]; and ". . . it usually took about a day to find another buyer, but at the most ten days to two weeks" [R. T. 1140]. As late as June 2, 1960, Oliver J. Farrell wrote to a Connecticut investor, stating: "With respect to liquidation, under normal conditions your request can be processed within a week's time. However, in the event of a heavy work load we would appreciate an advance request" [GX 641(a); R. T. 1993]. Oliver J. Farrell did not disclose in this letter that LATD&ME had at that time established a moratorium on honoring liquidation requests [GX 641(a)].

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[42]One investor testified as to the following conversation with David Farrell regarding LATD&ME's liquidation policy:

> "Q. Did you discuss at all, sir, the situation which might arise wherein the company would repurchase any trust deeds from you or your account? A. We never went into any of the details on that. All he did was assure me that all I had to do if I need cash, all or part of it, all I had to do was write a letter and I would get it. It meant to me that the account was completely liquid.
>
> Q. Was anything said about being on a best effort basis that you would be able to get your money out? A. No, I never heard that word or anything like it" [R. T. 1419].

See Oliver J. Farrell's similar explanation in portion of fact statement entitled "Role of Oliver J. Farrell in Scheme to Defraud".

LATD&ME salesmen failed to voluntarily disclose to investors the litigation between the company and the SEC [R. T. 1022-1024; 1120; 1138-1139; 1511-1512; 1801; 1839; 1870; 1962; 2182]; however, if the investors questioned them regarding this matter, LATD&ME salesmen characterized the litigation as a "test case" to establish the SEC's jurisdiction over LATD&ME [R. T. 765-769; 1101; 3298-3299]. They did not disclose that LATD&ME was charged with fraud and insolvency [R. T. 765-769; 1101; 3298-3299]. Salesmen also represented to investors that the litigation with the SEC had been instigated by the banking industry because it was losing customers to LATD&ME, using such language as ". . . the judge that was ruling against this was a member of a banking family, so consequently he was prejudiced . . ." [R. T. 1138]; ". . . the litigation was because the banking interests and the building and loan companies were so opposed to this sort of transaction—that they were doing the same things as Los Angeles Trust Deed, and making equally as much money, but only paying the public 2½ or 3 or 3½%." [R. T. 2276]; and "We had some trouble there, it was caused by the banks and savings and loans. They don't want us to get in on this" [R. T. 1532].

Even after the final decree was entered by the district court on May 20, 1960, LATD&ME solicited the accounts of new customers and accepted deposits of existing customers without disclosing the existence or results of the SEC litigation [R. T. 1022-1024; 1120; 1138-1139; 1904]. Between May 20, 1960, and June 8, 1960, the date the receiver took control of LATD&ME, salesmen continued to solicit and accept deposits

from investors [R. T. 1014-1015; 1120-1121; 1146; 1904, 2756], including investors residing outside of California [GX 642; 646; 829(a); 1001], and in overseas military installations [GX 583; 585; 586]. Such investors, pursuant to appellants' instructions, were not informed of the impending receivership [R. T. 1012-1013; 1120; 1138-1139; 1904]; instead, they were told by salesmen, during this period, that LATD&ME was ". . . as solvent as any bank or any savings and loan association" [R. T. 1011]. LATD&ME's salesmen not only solicited new accounts, they also persuaded existing investors not to liquidate or to defer liquidating their accounts [R. T. 765-769; 1828-1830; 1904-1905], by representing that LATD&ME was sound [R. T. 765-769; 1828-1830]. Oliver J. Farrell, during this period, induced investors to retain their accounts, stating that ". . . everything would be all right" and ". . . that this was a test case" [R. T. 766]. Investors who deposited their money with LATD&ME during the period May 20-June 8, 1960, were not assigned any trust deeds, nor did they receive their investment back on any earnings thereon. [R. T. 1017; 1148; 2761-2762].

Role of Oliver J. Farrell in Scheme to Defraud.

Oliver J. Farrell was sales manager of LATD&ME, as well as its secretary, vice-president, and one of its directors, from the inception of the Secured 10% Earnings Program, until the date the receiver took over.[43]

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[43]Oliver J. Farrell himself gave a fairly thorough résumé of his role and duties at LATD&ME in his "Position Description Questionnaire" [GX 2200], a portion of which is reproduced as Appendix M.

Also, he was vice-president and a director of TD&MM [R. T. 3111-3113].

Oliver J. Farrell employed, trained and supervised all local LATD&ME account advisers (salesmen) and conducted weekly sales meetings throughout California, instructing salesmen in effective sales techniques [R. T. 159, 3117]. All directives to branch office managers and salesmen emanated from him. He conducted "inspirational" conferences for new salesmen [R. T. 159]. All branch office managers took their orders from and were directly answerable to him [R. T. 509, 3114]. They went to him with "most any kind of a problem" [R. T. 159]. Oliver J. Farrell also wrote the sales meeting speeches and edited literature that was mailed out to investors [R. T. 160]. His letters to investors, as well as those of David Farrell were used as formats for form letters to investors [R. T. 208]. In short, no one else had authority to distribute anything out of the sales department which had not first been approved by Oliver J. Farrell [R. T. 3140].

Oliver J. Farrell testified that the liquidation policy of LATD&ME

> ". . . was to make a customer's funds available to him upon request by liquidating his trust deeds, either by purchasing them back for the company's account or by reassigning them to other customers who had money awaiting for the purchase of trust deeds" [R. T. 3102].

This is the same policy expressed in an "Outline of 3rd Sales Meeting" [GX 1413], in which he pointed out certain "magic words" the salesmen should use. There under the example "BECAUSE," he said:

> ". . . you can always get your money back out of a Secured 10% Earnings Fund BECAUSE all we have to do is assign the Trust Deeds in your portfolio to other customers or re-assign them back into our warehouse. It's as simple as that."[44]

Oliver J. Farrell instructed Frank Stark (Northern California regional sales manager and vice-president of LATD&ME), that the salesmen should stress the importance of the "big board" in selling the Secured 10% Earnings Program. Stark was directed to create the impression that the "big board" was useful in liquidating 10% earnings accounts [R. T. 541], although in fact it had no connection with the Secured 10% Earnings Program [R. T. 541-542; 697]. Nevertheless, Stark and his salesmen, pursuant to Oliver J. Farrell's orders, stressed the importance of the "big board" in selling the Secured 10% Earnings Program [R. T. 544; GX 1401].

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[44] *Cf.* this to the contention made in Brief D. F., p. 46, suggesting the evidence was clear and undisputed that the policy of LATD&ME was "that liquidation or sell orders will be handled 'on a best effort basis only'." Oliver J. Farrell himself rebuts this allegation as seen *supra,* as did investors whose testimony revealed that they were told they could liquidate within a short period of time, with no reference being made to on "a best efforts basis."

Oliver J. Farrell had a major role in drafting an article in January, 1959, Trust Deed Topics [GX 846] describing subordinated trust deeds that LATD&ME was introducing into investors' accounts. Reprints of this article were sent to LATD&ME salesmen, and to all investors receiving such trust deeds [R. T. 3145, 3146]. The article was intended to convince investors who were receiving subordinated trust deeds created against units of raw land that the subdividers had large cash equities in the subdivisions [R. T. 3146, 3152-3155]. In addition, pursuant to Oliver J. Farrell's instructions, salesmen displayed to potential investors the current LATD&ME brochures, pointing to a photograph of an "American home" and the statement:

> ". . . If you sold your home and the person to whom you sold it made substantial down payment and you took back a second trust deed, you would feel relatively safe, wouldn't you? Such trust deeds against individual real estate sold by property owners who receive a substantial down payment, are the type which we generally purchase and sell to you" [GX 444; 843; R. T. 3152-3154].

Thus, it was at the specific direction of Oliver J. Farrell that salesmen represented to investors that the subdividers who created trust deeds for LATD&ME against vacant tracts of land had made large cash investments in the subdivisions. The facts were, of course, that thousands of trust deeds were being manufactured against raw land in situations where the subdividers had not invested a single dollar.

Throughout the Secured 10% Earnings Program, Oliver J. Farrell instructed salesmen to represent that LATD&ME's *own* funds were being used to purchase trust deeds for inventory notwithstanding his knowledge that investors' money was in fact being deposited into the company's general accounts and used for the acquisition of trust deeds [R. T. 602-603; 3160-3161].[45]

With reference to the SEC litigation, Oliver J. Farrell instructed salesmen that no information was to be given unless the question was specifically asked. Even then, salesmen were to emphasize that the crux of the litigation was a dispute over SEC's jurisdiction to regulate institutions such as LATD&ME. The allegations of fraud and insolvency made by SEC were never to be brought up [R. T. 563; 566, 567].

Oliver J. Farrell admitted he "had heard" of some of the corporations through which David Farrell had received participations from subdividers [R. T. 3162], and that ". . .[he] had knowledge, but not specific knowledge as to some of these developments" [R. T. 3164]. He admitted that in late 1958 he discussed with his brother "some aspects" pertaining to the "participation" agreements [R. T. 3163], and that he knew his brother David was enjoying certain profits from "participation" arrangements [R. T. 3164, 3165].

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[45]See also white brochure [GX 1666] for representations that investors' money would be deposited in a trust account. David Farrell similarly represented that investors' money would not go into the general accounts of the company [R. T. 1422].

Oliver J. Farrell's compensation for the two and one-half years he served as sales manager for LATD& ME was in excess of $250,000 [R. T. 2608, 2609; GX 7801]. In addition, he obtained four lots in his own name in Embarcardaro Rancho [R. T. 3156-3158], a projected subdivision near Santa Barbara, California, financed by LATD&ME's investors.[46]

As receivership loomed, in accordance with Oliver J. Farrell's instructions, salesmen increased their efforts to secure new deposits without informing investors that LATD&ME had more liquidation requests than it could then honor [R. T. 3172]; that a moratorium had been declared on demands for liquidation [R. T. 3175]; and that trust deeds which had been created against mere grid maps were being confirmed to investors [R. T. 3159].

Oliver J. Farrell's basic sales policy was best stated in his instructions to salesmen not to confuse prospects with lots of facts and details. As he put it, "The more garbage, the more details, the more facts you throw into your sales pitch, the lower your odds of making a sale . . ." [GX 1415].

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[46]Oliver J. Farrell paid nothing for these lots but assumed mortages totaling $5,000 on two of them. Under cross-examination, he attempted to give the impression that all four lots were encumbered, but finally admitted that he had received two lots free and clear. He did develop a horse stable and riding academy, as appellants put it at his "own expense," though this is not strange since profits from this venture were to be his, that is, after he had supplied his brother David with "his choice over a period of years of five foals by any of the mares that I had bred" [R. T. 3155-3158].

The fact that Oliver J. Farrell recognized that he was engaged in a criminal enterprise is evident from his exchange of letters with the Northern California regional manager, set out in the margin.[47]

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[47]Frank Stark to Oliver J. Farrell—October 14, 1959 [GX 1449]:

"Due to our vast and continued expansion, which I feel sure we will enjoy in the future, I believe the time has come when additional sales help and training of our new and older customer representatives would be beneficial. I would like to make the following suggestions:

1. Moving pictures of carefully planned sales talks. These could be sent to each office along with the moving picture projector.
2. Slides on different phases of our type of investment, which can be used by various men in each office in the same manner for training purposes.
3. A sales manual made up after careful study for distribution to the different offices.

All of these would be extremely helpful. I would appreciate your giving serious thought and consideration to the above . . ."

Oliver J. Farrell to Frank Stark—October 15, 1959 [GX 1449]:

"With reference to your memo of October 14, 1959, subject as above, I concur with you that continued training programs are essential even for the older men . . .

"Motion pictures, slides and sales manuals would be very helpful, not only to the branch managers and salesmen, but perhaps also to the SEC, Corporation Commissioner, and Real Estate Commissioner. In fact, they could also be very helpful to our competitors if they got into the wrong hands. These are tangible items which can be supoenaed [sic], you know."

VI.
SUMMARY OF ARGUMENT.

The appellants in effect have conceded the sufficiency of the evidence as establishing a scheme and conspiracy to defraud. None of the areas of error asserted by appellants is of sufficient merit to require more than summary consideration by this court. The evidence of appellants' guilt as shown by the trial record is mountainous. If procedural errors were committed, they resulted in an advantage and not a disadvantage to appellants. The trial court's charge to the jury was an impeccable statement of the applicable law and no conceivable disadvantage to appellants could have flowed therefrom. If any error occurred in the admission of evidence, such evidence was merely cumulative and not prejudicial, and was invited by appellants, who not only did not interpose any proper objection, but also invited any such error by deliberately failing to bring the situation to the attention of the trial court.

VII.
ARGUMENT.

A. The Court's Charge to the Jury as to the Securities Counts Was an Entirely Fair and Proper Statement of the Law of This Case.

1. The "Notes" or "Evidences of Indebtedness" Offered the Public Under the Secured 10% Earnings Program Were Securities as That Term Is Defined in the Securities Act of 1933.

The Secured 10% Earnings Program constituted a medium for more than a simple sale of a second trust deed — an interest in real property; what was really offered by LATD&ME to the investing public were "notes," "evidences of indebtedness" and "investment contracts" as those terms are used in Section 2(1) of the Securities Act of 1933, 15 U.S.C. 77b(1). The appellants' contention that the trust deed obligations are not securities in the form of "notes" or other "evidences of indebtedness" is simply not supported by the case law.

In *Llanos v. United States,* 206 F. 2d 852 (9th Cir. 1953), *certiorari denied* 346 U. S. 923 (1954), the defendants devised a scheme whereby they gave their own promissory notes to obtain money for their own use by making various false representations about their business connections and about the use to which the money was to be put.[48] This court had before it the question

[48]The misleading and illusory quality of the "mutual agreement" obligations in *Llanos, supra,* has a definite resemblance to the legal quality of the trust deed notes, as interpreted by appellants, which were sold under the Secured 10% Earnings Program.

of whether promissory notes were securities within the meaning of Section 2(1) of the Securities Act, that section providing in pertinent part as follows:

> "The term securities means any note . . . evidence of indebtedness . . . investment contract . . . or in general any interest or instrument commonly known as a 'security'."

The appellants, in *Llanos,* contended that the last clause of the above-quoted section, ". . . any interest or instrument commonly known as a 'security' . . ." limits those which come before, and cited many cases which held that promissory notes were not "securities" under other statutes. This court, in holding that the promissory notes were securities, put to rest appellants' contention by stating at 854:

> ". . . These cases involved the interpretation of the word 'securities' as used in particular acts and did not involve the definition of 'security' given in the above statute. In defining the word 'security' in Section 2(1) of the Act, Congress intended to include all interstate transactions which were the legitimate subject of its regulation and the section should not be construed narrowly. . . ."

In addition, this court held the instruments were clearly "evidence[s] of indebtedness" and as such fell within the statutory definition of securities, citing *United States v. Monjar,* 147 F. 2d 916, 920 (3rd Cir. 1945), *certiorari denied* 325 U. S. 859; also see 4 Duke B. J. 52 (1954).

In *United States v. Monjar, supra,* appellants were indicted for violations of Section 17(a)(1) of the Se-

curities Act of 1933 and mail fraud, in connection with a scheme to defraud involving the solicitation of "personal loans", evidenced by receipts, entitled PLs and CDs. The trial court, citing *S. E. C. v. Universal Service Association,* 106 F. 2d 232, 235 (7th Cir. 1939), *certiorari denied,* 308 U. S. 622 (1940), had held the receipts to be securities:

> "Each person making a loan received a receipt signed by the person accepting the loan as 'agent' and making reference to 'H.B.M.-PL' or 'H.B.M.—Personal Loan.' The receipts were the only evidence that defendant Monjar had borrowed money. *Those dissatisfied with the arrangement were to be allowed a refund of the amount advanced as shown by the receipts. To this extent, the receipts certainly fall within the category of an 'evidence of indebtedness' as that term is used in Section 2(1) of the Statute.* Again, the indictment charges that the money received from the loans would be used 'to organize business concerns which would operate for the benefit of the persons making the loans.' The money was paid over by the members who made the 'PL' and 'CD' loans with the expectation that the return to be obtained would give to 'worthy men' financial independence. Under such an arrangement, the receipts issued to those making the loans likewise come within the definition of an 'investment contract'." [Emphasis added]. 47 F. Supp. 421, 427 (D. Del. 1942).

The Court of Appeals affirmed, holding that the indictment sufficiently described the securities in the language of the statute as "evidences of indebtedness".

See also:

S. E. C. v. Vanco, Inc., 166 F. Supp. 422 (D. N. J. 1958), aff'd 283 F. 2d 304 (3rd Cir. 1960).

The record before this court is compelling that LATD&ME offered the public "notes" and "evidences of indebtedness" under their Secured 10% Earnings Program. The thousands of investors who were brought into the Secured 10% Earnings Program were assured that they were receving negotiable promissory notes [GX 1901-1932]; that their deposits with LATD&ME were like deposits with a bank [R. T. 1024; 1108; 1156; 1845; 1907-1909]; and *that the "estimated liquidation value"* shown on their monthly statements evidenced LATD&ME's indebtedness to them which was due and payable whenever they elected to withdraw their accounts [R. T. 775; 1801; 1930]. Investors were also assured that LATD&ME would honor liquidation requests, without delay [R. T. 1419; 1845; 1890].

The argument that the instruments were not "notes" and "evidences of indebtedness" *within* the meaning of the statute is demolished by the instruments themselves.[49] They are by their very terms unconditional and unqualified obligations of the makers. They were so described by the appellants in the brochures sent to investors. The brochures, for example, described the notes as "negotiable notes" and referred to the careful screening made of the credit standing of the makers of the obligations [*e.g.,* GX 843]. There is not a line of evidence in the record that the appellants made any disclosure what-

[49]A typical such note is set out in Appendix F.

soever to any investor, whether a resident of California or a soldier stationed in Korea, that the "straw" corporations manufacturing the obligations that went into investors' accounts contended that they were shielded against liability under California law. This, of course, was simply another element of the scheme to defraud. Therefore, if the nature and quality of the instruments are to be judged by what they "were represented to be", *S. E. C. v. Joiner Leasing Corporation,* 320 U. S. 344, 353 (1943), the instruments must be classified as securities.

The appellants contend that *under California law* the promissory notes and other trust deed obligations which were sold to investors represent "purchase money obligations" which are not enforceable against the makers or trustors, except to the extent of the realizable value of the units of land securing the obligations. Thus, they assert that, as the trustor or obligor is not subject to personal liability or to deficiency judgment, in the event upon foreclosure the security proves to be inadequate, the instrument is not a "note" and is not an "evidence of indebtedness."

Initially it should be noted that federal law and not California law determines whether or not instruments are securities under Section 2(1) of the Securities Act of 1933.

Los Angeles Trust Deed and Mortgage Exchange v. S.E.C., 264 F. 2d 199, 211 (9th Cir. 1959);

S.E.C. v. Variable Annuity Life Insurance Co. of America, 359 U. S. 65, 69 (1959).

Under federal law, as the Supreme Court has said,

> *"The test rather is what character the instrument is given in commerce by the terms of the offer, the plan of distribution, and the economic inducements held out to the prospect. In the enforcement of an act such as this it is not inappropriate that promoters' offerings be judged as being what they were represented to be."* (Emphasis added.)
>
> *S.E.C. v. C. M. Joiner Leasing Corp.*, 320 U. S. 344, 352-353 (1943).

Even if California law were in some way relevant, the holdings in appellants' cited cases are not in the slightest compelling on a factual situation such as presented in the case at bar. In fact, in *People v. Davenport,* 13 Cal. 2d 681 (1939) cited by appellants, the court states at 684:

> ". . . the mere fact that a transaction is clothed in the language and form of . . . [a purchase money situation] is not in itself a conclusive badge of its innocence. In proper circumstances 'courts have looked through form to substance . . .'"

Appellants disregard entirely the true nature of the trust deed notes created under the Secured 10% Earnings Program, in relying upon Section 580b of the California Code of Civil Procedure as establishing that, as "purchase money obligations," the instruments are not enforceable against the obligors except to the extent of the value of the land securing the obligations. This argument assumes that, under California law, the courts would hold that the thousands of trust deed obligations manufactured at the instance of appellants by

"straw" corporations controlled by appellants and real estate speculators, pursuant to a deliberate scheme to establish unrealistic and illusory *face values* as a means of defrauding investors, are true "purchase money obligations." In *Roseleaf Corporation v. Chierighino,* 59 A. C. A. 45, 52 (1963), the Supreme Court of California stated that Section 580b of the California Code of Civil Procedure [Appendix N] was intended to put on the vendor the risk of accepting inadequate security for a purchase money obligation, as a means of discouraging overvaluation, noting that ". . . Precarious land promotion schemes are discouraged, for the security value of the land gives purchasers a clue as to its true market value."

2. The Jury Was Properly Instructed in This Matter.

The court's instructions to the jury, whether considered separately or as a totality, were impeccable statements of the law of the case. If the trial court erred, it did so to the advantage of the appellants and not the government. This is how it should be. The court did not, as suggested by appellants, withdraw from consideration of and determination by the jury, any fact, disputed or otherwise.

The reliance by appellants *Roe v. United States,* 287 F. 2d 435 (5 Cir. 1961) is misplaced. In *Roe v. United States,* it was held that the trial court had invaded the province of the jury by instructing them that the instruments involved were "investment contracts" and therefore securities. In the instant case the court below repeatedly admonished the jury, in unmistakable terms, that in weighing the guilt or innocence of the defendants under the Securities Act counts,

the jury, themselves, must arrive at a factual determination whether the instruments involved were securities within any of the statutory definitions which the Government contended were applicable.[49a]

The appellants, of course, sought to confine the instruction to the single question of whether the Secured 10% Earnings Program involved the issuance and sale of "investment contracts," within the statutory definition. The court below correctly ruled that the government should not be so circumscribed in its presentation; and that if, as alleged in the indictment, the jury made the determination from the evidence that the instruments the appellants were selling were "notes" or "evidences of indebtedness" or "investment contracts" within the statutory definition, then that element of the offense was satisfied.

There is no ambiguity or uncertainty in the definition of "security" as including the type "note" or "evidence of indebtedness" involved in this case. As the Supreme Court has said in determining whether an instrument is a security, it is unnecessary to do anything "to the words of the Act; [but] merely accept them." The Court continued by stating instruments could be proved to be securities under the Act by "proving the document itself, which on its face would be a *note,* a bond, or a share of stock" while in other instances "proof must go outside the instrument itself. . . ." (Emphasis added.) *S. E. C. v. Joiner Leasing Corporation, supra,* at 355.

[49a]The court's instructions on this issue [R. T. 4266-4274] are set out in Appendix O.

See also:

United States v. Corbett, 215 U. S. 233, 242, 30 S. Ct. 81, 54 L. Ed. 173, 175 (1909);

Donnelly v. United States, 276 U. S. 505, 512, 48 S. Ct. 400, 72 L. Ed. 676, 678 (1928);

United States v. Giles, 300 U. S. 41, 48, 57 S. Ct. 340, 81 L. Ed. 493 (1937).

B. The Evidence Concerning the Civil Litigation Between the Securities and Exchange Commission and Los Angeles Trust Deed & Mortgage Exchange Was Properly Admitted.

The grand jury charged in the indictment in the instant matter that the appellants concealed from investors the true nature of the civil litigation, i.e. that the litigation was not solely a jurisdictional dispute but involved charges of fraud and insolvency. The government's position was and is that regardless of the truth or falsity of the charges, an LATD&ME investor, prior to depositing his money with the firm was entitled to have knowledge of the actual allegations, so that he could make suitable inquiry before entrusting his savings to LATD&ME.

The trial court recognized that the government was entitled to establish as an element of the scheme to defraud, appellants' callous course of conduct in continuing to ensnare investors while concealing and misrepresenting the true nature of the civil litigation.[50]

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[50]The court pointed out:

". . . I feel . . . that the offers of the pleadings and the Answer, and of the time the decree was entered would be relevant and material on the question of good faith.

Now, on the other hand, I recognize that there is material in the pleadings and there is material in that order which on

The court, however, rather than allow the government to refer to or introduce into evidence copies of the civil pleadings, decided upon a procedure which was much more generous to appellants than the situation demanded. The court gave the jury a brief summary of the civil litigation in the most innocuous manner. [R. T. 3026-3029.][51]

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the face of it is—let's say it will be highly prejudicial if it wasn't relevant and material. But, of course, we have those problems in trials of lawsuits, where material may be highly prejudicial, and still if it contains something that is relevant the court has no alternative but to admit it and then try to instruct it out." [R. T. 2872].

[51]"The Court: Members of the jury, in lieu of the acceptance in evidence of Exhibits 1950, 5200, 5201 and 1950-A, I will give you a summary of some of the facts in such exhibits which I deem of possible relevance or materiality for your consideration.

On March 24, 1958, the Securities & Exchange Commission filed a Complaint against Los Angeles Trust Deed and Mortgage Exchange, Trust Deed & Mortgage Exchange, Trust Deed & Mortgage Markets, David Farrell, Oliver J. Farrell, Roy A. Bonner, and Thomas Wolfe, Jr., charging the defendants with violation of certain Sections of the Securities Exchange Act, including charges that defendants were engaged in transactions, practices and a course of business which operated and would operate as a fraud and deceit upon purchasers of such alleged securities.

On October 8th, 1958, the Commission filed an Amended and Supplemental Complaint charging the corporate defendants with misappropriation of funds entrusted to them by investors under the Secured 10% Earnings Program, and further charged that said corporate defendants were insolvent and unable to meet their current obligations. The Amended Complaint included as a party defendant Stanley C. Marks.

The charges in both the original and the Amended and Supplemental Complaint were denied by the defendants.

On May 20, 1960, a judgment was entered in said proceedings permanently enjoining the defendants from engaging in the acts as charged. The effect, however, of this injunction was stayed—that is, put off—by an appeal.

Pursuant to the judgment the Receiver took charge of the assets and business of the corporate defendants on June 8, 1960.

Now, neither the charges made in the pleadings in such case nor said judgment are to be considered by you as evidence of the truth of such charges. The above statement of facts is given to you solely in connection with your consideration of the charges

While appellants now assert as error this act of judicial beneficence, it was the appellants who chose to cover up, to conceal, and to misrepresent the civil litigation. They chose to solicit and accept millions of dollars from investors under such conditions of concealment and affirmative misrepresentation. They were wrong. As the trial judge said in referring to the obvious relevance of the prior litigation:

> ". . . no mater how bloody the corpse, if it is relevant and material, the State is entitled to try its case to the hilt." [R. T. 342].[51a]

Appellants' cited case of *Monte Green v. State of Indiana,* 204 Ind. 349 (1933), 184 N. E. 183, is not applicable to the situation at bar. In the *Green* case, the decisive issue to be determined at the criminal trial was whether the bank was insolvent at the time that officers of the bank received a certain deposit. The prosecution introduced the record of a prior civil proceeding in which it had been determined that the bank was insolvent. The Appellate Court held the admission of the record was error because:

1. There was a difference between civil insolvency and criminal insolvency;
2. The introduction of the evidence would in fact determine the issue of insolvency in the minds of the jury;

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made in Paragraph 11, Count one, of the indictment." (After the jury retired from the courtroom, during the recess, the court pointed out, ". . . I have adopted this procedure, for better or for worse, and in line with what I think is the essential justice of the offer, and what I have said contains the relevant and material matter which should be submitted.") [R. T. 3026-3029]. (Emphasis added.)

[51a]Statement by Court during pre-trial proceedings.

3. The admitting of the testimony would in fact deprive the defendant of the right of cross-examination.

In the instant situation, the court's summary of the civil litigation was introduced *solely* to show there had been in fact a civil proceeding in progress and not as evidence of the truth of the charges. In addition, members of the jury were specifically instructed *not* to consider any determination made in the civil proceeding in determining the guilt or innocence of the accused.

Implicit in the rule that a civil judgment is not admissible in a criminal case is the difference in the quantity of proof necessary to prove criminal charges. This principle, however, is not applicable where the fact of the civil proceeding is *not* received as evidence of any disputed fact which was adjudicated in the civil proceeding. Such is the situation in the case at bar where the material in question (summary of prior proceedings), was not introduced to establish the appellants were guilty of fraud, but only that certain allegations had been made, without regard to their truth or falsity.

State v. Morris, 109 Wash. 490 (1920), 187 Pac. 350 (1920);

Krull v. United States, 240 F. 2d 122 (5th Cir. 1957), *certiorari denied* 353 U. S. 915.

C. The Appellants Were Not Prejudiced by Evidence Concerning Losses by Investors or Occurrences Subsequent to the Receivership Established for Los Angeles Trust Deed & Mortgage Exchange.

The appellants contend that, as the government was not required to allege or show that anyone was defrauded or that investors lost money [*Bobbroff v. United States,* 202 F. 2d 389 (9th Cir. 1953)], evidence to that effect should not have been received. While not required to allege or prove the success of a scheme to defraud or that losses resulted as an element necessary to sustain a conviction, the government not only may but usually does introduce such evidence in securities and mail fraud prosecutions. *Rice v. United States,* 35 F. 2d 689, 695 (2nd Cir. 1929), *certiorari denied,* 281 U. S. 730 (1930); *Lonergan v. United States,* 95 F. 2d 642, 646 (9th Cir. 1938), *certiorari denied,* 304 U. S. 581; *Lemon v. United States,* 278 F. 2d 369, 373 (9th Cir. 1960). In *Linden v. United States,* 254 F. 2d 560, 566 (4th Cir. 1958), the court held:

> "Proof that the scheme was effective should not be excluded as irrelevant. While it is true that the success of a scheme is not a necessary element of the crime defined in the Mail Fraud statute, nevertheless where, as here, the indictment charges the defendant with making captious, deceptive, and misleading solicitations, the effect of the solicitations upon the recipients is a highly pertinent fact in determining whether the solicitations are of the nature charged. . . . *The tendency of the form to mislead is shown by testimony that it did mislead.*"

In *United States v. Brown,* 79 F. 2d 321, 324 (2nd Cir. 1935), *certiorari denied sub. nom., McCarthy v. United States,* 296 U. S. 650, Judge L. Hand commented that it had been a custom for over twenty-five years in the Southern District of New York to admit such testimony:

> ". . . it may be relevant to show that after purchase the shares collapsed in value, on the theory that this helps to prove that they had no value when the accused recommended them . . ."

The appellants also contend that testimony of losses was inadmissible as the losses were realized after the business was removed from their control. The government, however, is entitled to introduce evidence of events occurring after receivership if those events tend to establish the falsity of representations made by the defendants. *Kaufmann v. United States,* 282 Fed. 776, 781-782 (3rd Cir. 1922), *certiorari denied,* 260 U. S. 735; *Neubauer v. United States,* 250 F. 2d 838, 841-842 (8th Cir. 1958), *certiorari denied,* 356 U. S. 927. The testimony of a receiver of losses which resulted from his effort to dispose of assets and collect debenture bonds has been held to be admissible. *Ridenour v. United States,* 14 F. 2d 888, 891 (3rd Cir. 1926). If the representations made to investors that trust deeds selected for the Secured 10% Earnings Program were of sufficient quality to protect investors, even if LATD&ME ceased to exist, had been true, the receivership would not, and could not have brought about the losses to investors.[52]

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[52]The trial judge repeatedly ruled that the basis of his allowing testimony by investors of losses was that such evidence was rele-

The admission of evidence of losses by investors in no way prejudiced the appellants. The court allowed appellants to call as witnesses, eleven supposedly satisfied investors to testify that LATD&ME honored their liquidation requests [R. T. 3257; 3284; 3290; 3302; 3305-3306; 3380; 3387; 3569-3570; 3576], and that they received monthly "earnings" checks [R. T. 3257; 3285; 3561-3562]. The appellants were also allowed to cross-examine investor witnesses called by the government to establish that they never requested the return of their funds from LATD&ME [R. T. 1802-1803; 1934; 1984; 2183; 2283], and that they received monthly "earnings" checks until the time the receiver took over [R. T. 1969; 2024-2025; 2282].

Appellants received an additional safeguard when the trial court charged the jury:

> "You shall disregard any evidence or testimony *of any customer of* Los Angeles Trust Deed & Mortgage Exchange and affiliated companies to the effect that a loss was suffered after June 7, 1960. The defendants are not charged with responsibility for acts occurring after that date." [R. T. 4304.] (Emphasis added.)

Appellants' present claim that the words *of any customer of* [LATD&ME] were omitted from the trial court's charge to the jury is not well founded.[53]

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vant and material in establishing the quality of the trust deeds and the financial condition of LATD&ME prior to receivership [R. T. 1493, 1516-1517; 1540-1542]. Moreover, this evidence was merely cumulative of other uncontradicted evidence showing the grossly inflated value of the trust deeds, and LATD&ME's insolvency.

[53]See Appendix P establishing that the court reporter inadvertently omitted the underscored words from the reporter's tran-

In addition, it should be noted that appellants never objected to the charge given by the district court [Brief, DF, p. 37] and never submitted any proposed instructions of their own [C. T. 469-498]. It is now too late to claim "prejudice" so severe as to cause a reversal of appellants' conviction.[54]

D. There Was No Staging of Investor Witnesses Intended to Inflame the Jury Against Appellants.

The "cutting edge of the government's case" was not, as contended by appellants [Brief DF, pp. 33-38] the selection of investor witnesses whose age, infirmities, lack of formal education, or financial distress was intended to arouse hostility against appellants and inflame the jury against them. The true "cutting edge" was the cumulative and indeed crushing weight of the evidence, much of it consisting of the internal records of LATD&ME and its affiliates, showing a cleverly designed, ingeniously plotted scheme and conspiracy to ensnare investors, which the appellants pursued until the very moment when on June 8, 1960, in accordance with the order of this court denying a stay of the receivership, their criminal conduct was interrupted. This was no "finely balanced" case as the appellants contend [Brief DF, p. 47]. The "glut of

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script though the underscored words are to be found in his shorthand notes taken when the court charged the jury.

[54]Rule 30, Federal Rules of Criminal Procedure, provides, in part:

> ". . . No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection . . ."

documentation," mentioned by appellants [Brief DF, p. 16], standing alone, established the existence of a cruel and heartless enterprise designed to defraud investors and enrich the appellants.

There was no staging of selected investor witnesses whose situations, when brought before the jury, were intended to "engender sympathy for the alleged victims and conversely antipathy against the [appellants]" [Brief DF, p. 34]; except to the extent that the submission of testimony of a reasonably balanced cross-section of the some 10,000 investors under the Secured 10% Earnings Program may have given the jury, as it was intended to do, a true insight into the scope, extent and essential quality of the scheme to defraud. The government not only called as investor-witnesses Mr. Lees [R. T. 1806], 69 years of age, with impaired hearing and unemployed; Mr. Campbell [R. T. 1842, 1847], 87 years of age, whose wife was in the hospital; Mr. Schanz [R. T. 1866-1867], 72 years of age, with impaired hearing; Mrs. Hlavka [R. T. 1789], a widow; and Mrs. Eppley [R. T. 719], a 72 year old widow; but also brought forward Mr. West [R. T. 2185, 2206], a 35 year old real estate broker and real estate appraiser; Mr. Broome [R. T. 1103-1104], a 44 year old salesman; Mr. Youngs [R. T. 1833-1834], 53 years of age, in the heat treating business; Mr. Freedman [R. T. 1405], a TV writer, who collaborates with his wife in writing novels; Mr. List [R. T. 1886], a school teacher, whose wife is a pharmacist; and Mr. Ray [R. T. 1526-1527], 67 years of age, who retired in 1957 after selling a printing business which he had owned for 30 years.

Moreover, of the 27 investors named as "count witnesses" in the securities and mail fraud counts, the government used only 19. Likewise, of the 15 investor-witnesses named in the conspiracy count, the government used only 10. The evidence as to transactions between LATD&ME and the remaining 8 investor "count witnesses", and the 5 conspiracy count investor-witnesses, consisting of records of LATD&ME, including correspondence with those investors, was introduced by stipulation and without objection.

The record is barren of any instance in which the defense objected to the testimony of any investor witness on the ground that the government was endeavoring to elicit irrelevant testimony concerning the age, marital status, health, financial status or other condition which might have been disallowed or restricted by the trial judge in his discretion. The appellants concede this to be so, and admit that the argument, which they anticipate, that such objections were waived, is perhaps well taken [Brief DF, p. 34]. However, they seek refuge in a reference to Judge Frank's observation [Brief DF, p. 34] that the government should not put defense counsel in the dilemma where "as experienced trial lawyers have often observed, merely to raise an objection to such testimony—and more, to have the judge tell the jury to ignore it—often serves but to rub it in," *United States v. Grayson,* 166 F. 2d 863, 871 (2d Cir. 1948).

Counsel for the defense were caught up in no such dilemma at any time during the course of the trial. The trial judge made it abundantly clear in his last pre-trial order [C. T. 290-292] that elaboration of all objections

was to be made during recesses and outside the presence of the jury. This salutary ruling was strictly observed. A portion of nearly every recess was taken up by the court in considering arguments and objections concerning matters which had arisen in the course of the proceedings.

Where doubt existed as to the propriety of any area of interrogation, the court repeatedly directed counsel for the government to proceed in a new direction until further argument could be heard in the absence of the jury [*e.g.,* R. T. 1492; 1506; 2040].

In *United States v. Brown,* 79 F. 2d 321, 324 (2nd Cir. 1935), *certiorari denied,* 296 U. S. 650, cited by Judge Frank in a footnote to his concurring opinion in *United States v. Grayson, supra,* at 870, the court rebuked the conduct of the government in "getting before the jury that in consequence of their losses some buyers had lost their homes and their business, and gone hopelessly into debt; that they lost everything including their friends, and were destitute; that their losses went into millions; that one unfortunate had committed suicide," but nevertheless, affirmed the mail fraud conviction in the light of the irrefragable showing of guilt of the accused. The court noted that it *had* "never given warrant to any such abuse" but had given sanction to ". . . evidence that the property bought turned out to be worthless, or that it greatly fell in value."

As Judge L. Hand said in *Grayson v. United States, supra,* at 867, ". . . it is never a ground of objection to evidence directly relevant to the crime that it exposes the accused to odium, or even implicates him

in another crime . . . It is true that a judge has discretion to rule out even relevant evidence if it is not cogent and is more likely to distract, than to inform, the jury; but that cannot be said of the very communications between the accused and his victims. So far as these incidentally arouse the hostility of the jury, he is without relief. . . ."

The statement of Judge Frank in *United States v. Grayson, supra,* at 871, that ". . . a prosecutor ought not deliberately and repeatedly [as he held to have been the case], put defendant's laywer in such an awkward dilemma—where his client will suffer if the lawyer does not object or if he does . . ." is without the slightest relevance to the trial proceedings which resulted in the conviction of these appellants. The trial judge held counsel for the government to the most rigid and exacting standards in the examination of witnesses and otherwise in the conduct of the trial. He frequently admonished counsel for the government for even the slightest impropriety [R. T. 1432-1433; 1968-1969; 2040, 2053; 2054-2057], and himself intervened at times, without objection having been made by defense counsel, when he considered that the examination by government counsel might be exceeding permissible limits [R. T. 1431, 1494-1496; 1977-1981; 2004; 2053].

The government is under a heavy obligation in a case such as this, involving intricate and complex financial machinations, intruding upon the lives of many thousands of investors of widely dissimilar circumstances, to lay before the jury the true fabric and structure of the enterprise. This is true notwithstanding the fact

that the proof may expose the accused as having engaged in a sordid and heartless course of conduct. As stated by Judge Bell in *Greenhill v. United States,* 298 F. 2d 405, 411 (5th Cir. 1962), *certiorari denied,* 371 U. S. 830, in affirming convictions for securities and mail fraud:

> "The fact that the government used, without objection based on prejudice, as five out of some twenty investor witnesses one who was blind, and others who were peculiarly objects of sympathy did not deprive appellants of due process of a fair trial. Appellants and not the government made them investors and prospective witnesses."

E. The Trial Court Did Not Commit Error in Admitting Exhibit 6003 Into Evidence.

1. Preliminary Statement.

Exhibit 6003 consists of two baskets containing customer "sell orders" together with their attached covering letters, which documents were a part of LATD&ME's records at the time it went into receivership.[55]

Although appellants now raise several contentions of error in the trial court's admission of Exhibit 6003 into evidence, none of these objections were presented below to provide the trial judge an opportunity to prevent any alleged error.[56] Any "error" which may exist,

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[55]R. T. 2798-2800.

[56]Exhibit 6003 was "admitted" into evidence on two occasions. The first time, during examination of Government witness Cole, appellants objected on the ground of "no proper foundation" [R. T. 2799], a basis not urged in this appeal [Brief DF, pp. 38-49]. Subsequently, during the direct examination of appellant David Farrell, it was discovered that the clerk did not have 6003 marked in evidence, whereupon it was again of-

was invited by appellants as a result of their withholding from the trial court during the trial their knowledge that one letter containing a "newspaper article" reporting Judge Clarke's remarks after the civil trial, and the other "prejudicial" letters were attached to the sell orders comprising Exhibit 6003.[57] Such

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fered by the government, "so that the question can be asked." Appellants made *no* objection [R. T. 4007] and 6003 was again received in evidence.

[57]After the trial, Attorney Dunn filed a Memorandum [C. T. 530] alleging:

> ". . . 6003 had attached to one of the 'sell orders' a highly prejudicial newspaper article concerning the civil trial between SEC and LATD&ME . . ."

At the time of the hearing of appellants' motions for judgment of acquittal, some three weeks after the trial, the court expressed concern as to when Mr. Dunn first became aware of the newspaper article. Mr. Dunn said that it had been brought to his attention on the morning of arguments, after discovery by O. J. Farrell [R. T. 4360]; then amended this comment by saying he did not find out about the article until the documents were in the jury's possession [R. T. 4361]. Subsequently, Mr. Dunn produced a note which he had received from O. J. Farrell during the time the jury had come in for some questions, which note was dated 4/16/62 at 4:55 p.m., and initialed by O.J.F. and Mr. Dunn himself. The note read:

> "I think the Government sneaked Judge Clarke's press release into evidence with the sell orders" [R. T. 4369-4370].

Attorney Holder, who had filed a declaration [C. T. 525] admitting:

> ". . . During the trial I examined a random sample of the sell orders contained in Exhibit 6003; because of the pressure of time the two boxes of sell orders were not carefully examined."

told the court at the hearing, that he personally was unaware during the trial, of the "press clipping," but that after the trial, O. J. Farrell had told him he "thought he saw a clipping in there." Mr. Holder then looked through 6003, for the article, and found it. In answer to the court's question: "And Mr. O. J. Farrell then knew that during the time that the trial was going on?" Mr. Holder responded, "I asume he did. I don't know. . . ."

objections may not be urged for the first time on appeal absent a showing of "plain error."[58]

Appellants were not surprised by an unexpected government offer of Exhibit 6003, nor did government counsel misrepresent its intended use of the exhibit.[59] Nor is the allegation that the government failed to conform to the order of the court to excise certain "prejudicial" material from 6003 supported by their transcript reference [Brief DF, p. 42].[60]

Irrespective of the foregoing, it is submitted that 6003 was properly admitted as a part of the business records of LATD&ME.

Finally, if there was error in the admission of the exhibit it was but "harmless error." The one "newspaper article" mentioned by appellants has received emphasis beyond deserved proportion. It was but a single attachment, doubled over and stapled to its accompanying "Customer sell order," selected by appellants out of the more than 800 sell orders. (The others contain no such

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[58]See:

Olender v. United States, 237 F. 2d 859, 866 (9th Cir. 1956), *certiorari denied* 352 U. S. 982 (1957);

Sekinoff v. United States, 283 Fed. 38, 39 (9th Cir. 1922);

Finnegan v. United States, 204 F. 2d 105, 111 (8th Cir. 1953), *certiorari denied* 346 U. S. 821 (1953).

[59]See argument, *infra.*

[60]The reference in the third paragraph of the transcript portion quoted by appellants [*i.e.* at R. T. 3043-3044] clearly speaks of those documents which have been "provisionally admitted." This term was used by the court to describe those documents and ledgers which had been offered by the government and specifically objected to because of lack of authentication of certain notations [see R. T. 3041, lines 13-24]. This question was never raised *re*: Exhibit 6003, and the quoted portion had nothing whatsoever to do with that exhibit.

attachment.) No showing has been made that the jury inspected any of the contents of Exhibit 6003, let alone that they found this specific document; or any of the other letters now questioned as being "prejudicial."[61] Further, even if the "article" or the contents of other letters had been seen, their content, was at most merely cumulative of the other evidence in the trial, and did not prejudice or affect the substantial rights of appellant.[62]

2. Appellants' Contentions of Error May Not Be Raised for the First Time on Appeal.

(a) *Appellants' Sole Objection at the Trial, to the Admission of Exhibit 6003, Was on the Ground of "No Proper Foundation"; and They May Not Urge New Objections for the First Time on Appeal.*

Appellants' argument[63] attacking the admission of Exhibit 6003 into evidence contains numerous contentions of error,[64] none of which were even suggested to the

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[61]See:
Carlson v. United States, 187 F. 2d 366 (10th Cir. 1951), *certiorari denied* 341 U. S. 940 (1951).

[62]See:
Gilbert v. United States, 307 F. 2d 322 (9th Cir. 1962);
United States v. Quong, 303 F. 2d 499, 504 (6th Cir. 1962);
Gordon v. United States, 164 F. 2d 855, 858 (6th Cir. 1947), *certiorari denied,* 333 U. S. 862 (1948);
Finnegan v. United States, 204 F. 2d 105 (8th Cir. 1953), *certiorari denied* 346 U. S. 821 (1953).

[63]See Brief DF, pp. 38-49.

[64]Appellants have failed to comply with Rule 18, Rules of the United States Court of Appeals for the Ninth Circuit, which provides:
". . . When the error alleged is to the admission or rejection of evidence the specification shall quote the grounds urged at the trial for the objection and the full substance of the evidence admitted or rejected, and refer to the page number in the printed or typewritten transcript where the same may be found. . . ."

trial court. At one time appellants did question the relevancy, competency, materiality and the lack of proper foundation of Exhibit 6003. The court at the time sustained their objection [R. T. 2795-2796]. Subsequently, when the foundation was laid and Exhibit 6003 was again offered, appellants limited their objection to "no proper foundation," abandoning the objections of lack of relevancy, materiality or competency. Counsel for David Farrell amplified his single objection in the following manner:

> "Your Honor, we object to it on the ground that there is no proper foundation. Especially in looking at 6002, and the dates, apparently, that are put on here they are all late in June, or June 6th and 7th, and certainly would not be admissible in that regard *unless there was a foundation as to the time the requests were received.*" [R. T. 2798-2799]. (Emphasis added).

The Court satisfied itself that the proper ". . . foundation as to . . . time . . ." had been laid by asking the witness Leroy Cole, who had supervised the inventory audit of LATD&ME:

> "Were these requests part of the books of the company when you went to make the audit at the time you assisted in taking over? Were they in the possession of the company at that time?"

The witness answered that "They were in the possession of the company", whereupon the court overruled this sole objection [R. T. 2799].

These claims of error then, including those of hearsay, surprise and improprieties on the part of the gov-

ernment, are matters being presented to this court for original determination.

Rule 51 of the Federal Rules of Criminal Procedure requires that in order to preserve a question for appeal:

> ". . . it is sufficient that a party, at the time the ruling or order of the court is made or sought . . . makes known to the court the action which he desires the court to take or his objection to the action of the court and the grounds therefor . . ."

Objections to the admission of records and documents, not having been made before the trial court, cannot be urged here as reversible error.

> *Olender v. United States,* 237 F. 2d 859, 866 (9th Cir. 1956), *certiorari denied* 352 U. S. 982 (1957).
>
> *Sekinoff v. United States,* 283 Fed. 38 (9th Cir. 1922),

(b) *Appellants "Invited the Error" of Which They Now Complain, by Their Failure to Apprise the Trial Court of Their Knowledge of the Alleged "Prejudicial" Material in Exhibit 6003.*

The documents filed by Attorneys Dunn and Holder, as well as their respective statements at the hearing on Appellants' Motions for Judgment of Acquittal, after the trial, clearly reveal that counsel and their clients had opportunity to, and did examine Exhibit 6003 and were aware of the "newspaper article" and other al-

leged prejudicial documents, during the course of the trial.[66]

Liquidation requests made by investors during the month of May and the first week of June, 1960 were recognized as material and relevant to the issues of the case by Attorney Holder and his client Oliver J. Farrell. Appellant Farrell stated that during May, 1960 ". . . a number of customers were waiting for the liquidation of their accounts . . ." [R. T. 3106]. On cross-examination he admitted that at the time they were increasing the sales campaign in May, 1960 ". . . [he] knew that the company had more liquidation requests than it was able to process immediately" [R. T. 3172]; that they came in from a substantial number of investors, perhaps several hundred; that the amount of money needed was ". . . in the high thousands . . ."; and that a mortorium had been declared on any investor requests to receive their money back [R. T. 3172-3175].

David Farrell also expressed complete familiarity with the problem of liquidation requests during his direct examination by Attorney Dunn, both generally and specifically regarding the contents of Exhibit 6003.[67]

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[66]See Footnote 57, *supra*.

[67]R. T. 4008—"Q. by Mr. Dunn: Mr. Farrell have you examined 6003? A. No, I have not examined it. I can tell by looking at it what it consists of.

Q. All right. Will you state what it consists of? A. It consists of some orders received by the company during this

The very documents contained in Exhibit 6003 themselves, patently indicate that both appellants David and Oliver J. Farrell, in their respective positions as President and Vice President-Sales Manager, knew before the trial ever began, the manner in which the sell orders were being used, how they were coming in, the types of documents which were attached to the sell orders, and what the company's procedure was in handling these sell orders.[68]

Appellants' statement in their appendix regarding letters containing ". . . a reference to Judge Clarke's statement"[69] is misleading. The reference pertained to a "form letter"[70] which is to be distinguished from

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period in question which had not been processed as of the June 8, 1960, date when the receiver took over.

Q. You are referring to the period of May and early June 1960? A. Yes; from May to June 1960. These are the remaining ones other than the ones we processed."

[68]At least 45 of the sell orders, or the letter attachments thereto, bear the initials "OJF," indicating that O. J. Farrell had reviewed those sell orders and their stapled covering letters. (*E.g.,* Sell Orders for Account Numbers: 768, 786, 841, 1063, 1231, 504, 3154, 3251, 3261, 3481, 3885, 5031, 7202, 7338, 1677, 1691, 2386, 7839, 6909 and numerous others. On the bottom of the letters attached to 20449, it is noted "O.J. would not ok for Rush 5-31-60." Nor is it surprising that these documents were reviewed by Oliver J. Farrell, in that he was the man responsible for the sales activities of all the branches of the company [R. T. 3097] and to whom all sales managers of the various branches were answerable [R. T. 3114].

Forty-six sell orders bear the name "O. J. Farrell" typed in the space apparently reserved for the name of the salesman for that specific investor. (*E.g.,* Account Numbers: 295, 401, 458, 5818, 7173, 20175, 20317, 20394, 20455, 20850, etc.)

David Farrell's name also appears on several other sell orders: (Account Numbers: 20228, 20229, 20380, 20449).

[69]See for example the reference to the letter of Joseph Pearson No. 4703, Brief, O.F. Appendix p. 21.

[70]"..... 1960.

"Recent articles in the newspapers quoting statements made by Federal Judge Thurmond Clarke concerning SEC

the stapled copy of the "newspaper article", which was but one of over 800 documents found in Exhibit 6003.

The record shows that this "form letter" was prepared by appellants and sent by them to investors who were planning to close out their account. Appellants, through their "form letter" attempted to solicit information from investors regarding whether or not their planned liquidation was based on "adverse publicity". This "form" used in a manner which invited its return with the sell order, is now claimed to be "prejudicial."[71] Appellants were trying to document for future use, that investors closed out their accounts because of

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hearings in the District Court, caused me to lose confidence in the Los Angeles Trust Deed and Mortgage Exchange, and to request the liquidation of my trust deeds as soon as possible. This is the sole reason for this request and nothing the Exchange has said or done has caused me to have any doubts or complaints.

.....

....."

[71] *E.g.*, Customer Sell Order for account No. 3134 for customers J. C. and Norma B. Greer, has as an attachment, an office memorandum and a small 3"x4" typed note, which says:

"Dear Mrs. Greer:

"If you are with-drawing your funds for the reasons specified on this form, will you please sign it also, and return it with the customer Sell Order? Thank you."

This note is stapled to an unsigned form, wherein a small "x" had been indicated at the place for the signatures of the Greers. The customer wrote on the form at the bottom "No, I am being transferred to the East coast. James C. Greer.", and did not sign the form where indicated.

No. 9132—Customer Sanders: Attached to the Sell Order is a copy of the form letter, wherein after the first words in the first sentence "Recent Articles in the newspapers quoting statements . . .", the word "allegedly" is interlineated into the sentence. Also attached to the Sell Order and to the form letter is a letter on the TD&ME Letterhead addressed to Mr. O. J. Farrell from G. K. Sloan, which letter reads in part as follows:

"Dear O.J.

Re: *Liquidation Senders No. 09132.*

Enclosed is a Customer's Sell Order re: the above noted

the alleged adverse publicity stimulated by Judge Clarke's order, and the newspaper comments thereon, rather than because of improprieties in the basic company operation.

The aforementioned familiarity with these sell orders, and Exhibit 6003 in its entirety, both *before and during the trial,* leaves no doubt that appellants knew exactly what was contained in the sell orders, and the types of documents and letters which customers had attached to them in closing their accounts.

On May 14, 1962, at the post-trial hearing of appellants' motions for judgment of acquittal, the trial judge expressed his consternation that appellants had not revealed their knowledge and concerns about the documents contained in 6003 to him at a time when he could have reviewed their objections in a timely manner so as to eliminate any "prejudicial" material from that which would be going to the jury. When Attorney Dunn pointed out that he hadn't brought it to the court's attention because ". . . I didn't find it out until after the documents had been in the jury's possession" and that "it happened at a time when it was too late to bring it to the court's attention", the court responded, at Reporter's Transcript 4361:

> "No, it is never too late. I could have still called it back from the jury, still called the box

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account. Will you kindly submit it for processing? Enclosed also is a statement signed by Mr. and Mrs. Sanders with regard to the SEC hearings."

No. 5124—Customer Watters: Attached to the Sell Order is a signed form letter, as well as a memorandum on TD&ME letterhead from the Santa Barbara office to the Administrative Department, wherein it is noted: "Enclosed is portfolio on TD 11654, Sell Order for withdrawal in full, and signed Affidavit re publicity."

back, and if it hadn't been tampered with—I just can't see, Mr. Dunn, if it was known to the defendants either before or after this was submitted to the jury, and before the jury returned its verdict, it was not proper, of course improper conduct not to inform the court.

I was interested in how that happened to be discovered at that time. That is all I have to say on that."

Prior to denying appellant's motions, the court again addressed itself to what it referred to as "invited error" on the part of appellants and amplified its feeling of how appellants had not met their obligation to advise the court of what they believed to be objectionable material in Exhibit 6003, and that they had "taken their chance" by remaining silent at a time when the court might have remedied the situation, if such would have been necessary.[72]

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[72]At R. T. 4379-4381, the court observed:

"However, there was the new question which was raised, or you might say new questions in connection with Exhibit 6003. Now with the explanation which we have here this morning, I feel that there was an obligation on, first of all, the part of the defendants, when the defendants knew that that particular material was in 6003, to so advise the court, and of course there is no doubt but that the court would have removed that from the file, and if there was other material in the file of a like nature, such as letters, there is no doubt but that the court would have removed that. I think the record here speaks for itself that during the course of the trial every time a matter was mentioned where some objectionable material was on an exhibit, that the court, if it admitted it at all, admitted it provisionally on the removal of the objectionable material. So in view of that fact, and of the further fact that before the jury returned its verdict that counsel for David Farrell was informed, at least, that the exhibit might be in the possession of the jury, and that that information was not called to the attention of the court, at which time the court might then have called for a return

As the court pointed out, there was no showing that the jury even considered the contents of Exhibit 6003, a point bolstered by government counsel's observation that the jury would have had difficulty in reading the "newspaper article" (which was then in court) because of the manner in which it was stapled to the accompanying Sell Order [R. T. 4373].

In *Finnegan v. United States,* 204 F. 2d 105 (8 Cir. 1953), *certiorari denied* 346 U. S. 821, a case presenting a similar problem, where the documents involved had *not* been introduced into evidence, yet mistakenly found their way into the jury room; the Court rejected the contention that the defendant was prejudiced, and in affirming the conviction, held:

> ". . . The question was raised on motion for new trial. The motion was not only entertained but this specific question was considered by the court and passed upon adversely to the defendant. The ruling of the court on motion for new trial is not ordinarily reviewable on appeal if the court entertained the motion and its decision thereon is not manifestly an abuse of discretion. . . . (cita-

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of the exhibits, in order to determine if the jury had in any manner investigated this particular exhibit, at that time the court could even have interrogated each of the jurors as to whether they had read the particular article. And maybe the court, if the jurors had said yes, why, at that time maybe the court would have declared a mistrial. But now the defendants have taken their chance, and whether the jurors or any one of the jurors read it, of course we don't know. I therefore feel that *if there was any error* committed in permitting this or the other exhibits containing, say, like material, if there are such, why, *that error was at least in part invited by the defendants* and that they should not at this time be permitted to claim that it should not have happened. . . ." [R. T. 4379-4381; Emphasis added.]

tions omitted). In the instant case, the court gave careful consideration to the motion and denied it on three grounds: (1) That defendant's attorneys who were present at the time the exhibits were sent to jury were under a duty to examine them and failed to object to the submission of the documents to the jury; (2) That the matters contained in the documents were cumulative to other evidence which the jury had heard and . . .

". . . Defendant's counsel had notice that it was the purpose of the court to send all exhibits to the jury and no objections were made . . . There was no showing that the jury in fact examined these exhibits and there is no evidence indicating that defendant was prejudiced by their having been placed in the hands of the jury. . . ."

It is submitted that the above quoted decision parallels the rationale of the trial court in the instant case, in its denial of appellants' motions for judgment of acquittal, and that the question here should be disposed of in similar fashion.

3. Appellants' Argument That Exhibit 6002 Was Not a "True Summary of Exhibit 6003 as Represented to the Court by the Government," Misstates the Context of Witness Cole's Testimony and the Stated Purport of Exhibit 6002.

Appellants argue that the government, through its witness Leroy Cole, misrepresented the purport of Exhibit 6002, and that it was not a "true summary of the content of Exhibit 6003," according to the dictionary meaning of the word "summary." They further suggest that: ". . . Unless the Court examined 6003,

in detail there would be no way for the Court to be made aware of its true contents."[73]

The partial quotation of Cole's testimony, wherein he stated: "We made a summary of the requests for liquidation that were on hand on June 8," does not fairly reflect the complete context of Cole's explanation of the subject of his compilation marked Exhibit 6002. Cole fully described his purpose in preparing Exhibit 6002, as follows:

> "Medvene: I place before you Government's 6002 and ask *what that purports to be?* (Emphasis added).
>
> "Answer: This purports to be a list of the individual requests for liquidation which were in the hands of the Los Angeles Trust Deed and Mortgage Exchange on June 8th, 1960. This lists the *customer number, the date of the request,* and *the amount that was requested for liquidation.* This consists of approximately eight hundred requests, and the total amount is $3,630,000. These are all dated in May and June of 1960." [R. T. 2798]. (Emphasis added.)

Appellants concede the accuracy of Exhibit 6002 as to its statistical content, and complain only that it did not include other information contained in the sell orders or letter attachments, comprising Exhibit 6003. (*E.g.,* The various reasons stated by investors for closing their accounts, etc.) Not only would such information have been quite outside the scope of Cole's accounting computations, but appellee finds strange the inconsistent atti-

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[73]Brief DF, pp. 48-49.

tude on the part of appellants by their present complaint that Cole did not also include this "prejudicial" material in Exhibit 6002.

In *Carlson v. United States,* 187 F. 2d 366 (10th Cir. 1951), when an objection was urged as to a compilation of figures made by an accountant, and taken from certain records, the court held at 372:

> ". . . All of this statistical data was taken from other exhibits which were introduced in evidence. It reduced these figures to concise form. It is not contended that the exhibits do not correctly reflect the information taken from a great number of individual exhibits. All the data shown by these exhibits were contained in other exhibits in evidence. Reducing it to a simpler form did not prejudice the rights of appellants and there was no error in the receipt of these exhibits."

Appellants are not only presenting an unsupported allegation to this court for the first time, but it appears a belated attempt to seek relief on a point which they elected to remain silent about in the trial court. That they were aware of the nature and "true contents" of Exhibit 6003 has been clearly demonstrated. Yet neither they nor their counsel chose to complain regarding the subject matter of Exhibit 6003, or that they did not feel that Exhibit 6002 depicted a fair summary of all of the documents in 6003.

4. The Government Did Not Mislead or Surprise Appellants as to Its Intended Use of Exhibit 6003.

The appellants contend that the government made spurious representations to the court when it "advised repeatedly that it was not going to submit the Exhibit 6003 into evidence and was not going to use it . . .".[74]

Contrary to appellants' statement, nothing said by government counsel misled them as to the intended use of Exhibit 6003. These documents were brought into court solely as underlying records to support Leroy Cole's computations found in Exhibit 6002. The necessity for the ultimate government offer was precipitated by appellants' own demands.

The documents comprising Exhibit 6003 were brought to the court's and appellants' attention in a discussion which occurred, out of the presence of the jury, on March 20, 1962; some three weeks prior to the end of the trial [R. T. 1628]. Government counsel advised that a box of records was available to appellants, which contained liquidation requests which LATD&ME had received prior to the close of business, and which had not been honored as of that time. Counsel further pointed out: "We think they have seen them all. They got all the letters"; that these documents had been "kept down at LATD and the defendants had as much access to them as we had"; and that they had been examined in 1960, as a part of underlying records, by an independent accounting firm [R. T. 1628-1631]. The government's position was clear that it did not

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[74]Brief DF, pp. 46-47.

Note: The reference at the top of Brief, DF, p. 40, to the government's "statement", did not refer to GX 6003.

want to, nor intend to offer the records comprising Exhibit 6003 into evidence, inasmuch as it contained only underlying records, *unless the court or defense counsel* wanted it in.[75] Thereafter, defense counsel made nu-

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[75]The context in which the government introduced GX 6003 appears at R. T. 1664-1667, and is not as stated by appellants (Brief D. F., p. 39):

". . . we tried with those records, and others, even if they are not going to be evidence, to give that information to defense counsel.

"We don't intend to use anything in that box, sir. But when a witness is on the stand and testifies that x amount of dollars, and so forth, were in liquidation, we just want to mark that information. They are the defendant's records.

"We are not going to introduce them and take the time of the court. But we just wanted them available to defense counsel.

". . . I think I conveyed to the court that we *wanted* to put them in evidence. *We don't.* It is just the underlying data.

"It is the same thing with the other accounting records that we are trying to get together. *We are not going to put that in as evidence, unless your honor wants it in or defense counsel wants it in. We have no objection to it, but it wasn't our plan to put it in. It is just the underlying data.* (Emphasis added.)

"We thought we could help expedite things if we presented it now."

"The Court: I understand your statement here now . . . It is here for counsel for the defendants to examine it . . . I understand that you will call witnesses, however, that have actually examined this material; is that correct?

"Mr. Medvene: Yes, sir.

"The Court: They will be expert witnesses that will say they have examined the records of LATD and that these records are the records here which you are referring to.

* * *

"Mr. Dunn: All I can say, your Honor, is that apparently the Government wants us to examine these for some reason. We don't know the purpose at the present time. If there is going to be accounting data submitted to this court, summaries and things of that kind, upon which this material is based, we need to have summaries in order to analyze

merous objections on grounds of lack of foundation or that the supporting records for particular summaries which Mr. Cole had prepared, were not present in the courtroom, and in evidence.[76] [R. T. 2787, 2790].

The Court sustained the objections and it became obvious that defense counsel and the court wanted the underlying records of LATD&ME to be admitted in order to support Mr. Cole's testimony. The government then, and only then, offered GX 6003 in evidence.

5. Exhibit 6003 Was Properly Admitted Into Evidence as Business Records of LATD&ME.

Appellants presently urge Exhibit 6003 is not a business record, and therefore is not admissible into evidence as an exception to the hearsay rule. Appellants did not raise this objection below, thus effectively precluding the court from remedying any possible gap in the record.

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them with the material. It would do no good for us now. . . .

"The Court: When are the summaries going to be available?

"Mr. Medvene: As far as the summaries are concerned, we submitted an exhibit register on them, and the summaries will be in this court five minutes after we close. . . ."

[76]After a discussion relative to another of Mr. Cole's accounting statements, GX 6000, and a showing that LATD & ME was insolvent to the extent of $1,250,000, the following colloquy occurred [R. T. 2790-2791]:

"Mr. Jacobs: I move to strike that, if the court please, on the ground that there is no foundation laid for it, the statements that he used, unless we have the record itself.

The Court: What do you mean by 'no foundation'?

Mr. Jacobs: The foundation would be in the work sheets, your Honor, and the records themselves.

The Court: In other words, you are raising the objection that the records on which he relies are not in evidence? Is that the question you are raising, Mr. Jacobs?

Mr. Jacobs: Right.

The Court: Objection sustained. And the answer is stricken."

Appellants' counsel not only did not raise this objection below, but expressly informed the court that Exhibit 6003 contained "business records" used by LATD&ME "during its course of business" [R. T. 4349; C. T. 530].

Assuming this court were to permit appellants to reverse their previously taken position, the government respectfully submits the records in question were admissible under the business records exception to the hearsay rule.

> 28 U. S. C. 1732 (Federal Business Records Act);[77]
>
> *Olender v. United States*, 237 F. 2d 859, 866 9th Cir. 1956, *certiorari denied* 352 U. S. 982 (1957).

The printed form entitled "Customer Sell Order" was prepared by LATD&ME and designed by them as a means through which investors might close out their accounts. The company anticipated partial preparation of the "form" by the customer; approval by the sales representative; and notations by the LATD&ME staff.[78]

> "All the hallmarks of authenticity surround this document, since it was made pursuant to established company procedures for the systematic, routine, timely making and preserving of company records." *United States v. Olivo,* 278 F. 2d 415, 417 (3rd Cir. 1960).

See also:

> *United States v. Tellier,* 255 F. 2d 441, 448 (2d Cir. 1958), *certiorari denied* 358 U. S. 821.

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[77]See Appendix Q.

[78]GX 1663. See Appendix R.

The cases cited by appellants are readily distinguishable from the instant case. In *Amtorg Trading Corp. v. Higgins,* 150 F. 2d 536 (2d Cir. 1945), the letter in question was not a record of any business transaction, made as a systematic routine during appellant's business. The "sell orders" in the instant case were routinely made, used, and retained as a part of the books and records of LATD&ME. In *Standard Oil Co. v. Moore,* 251 F. 2d 188, 213 (9th Cir. 1957), *certiorari denied* 356 U. S. 975 (1958), the subject documents consisted largely of interoffice communications concerning the marketing, pricing and practices of *other* oil companies and of competing service station operations. This Court pointed out that records are admissible under Section 1732 if they:

> " . . . reflect the day-to-day operations of a commerical enterprise . . . in which it is *directly concerned as a participant.* . . ." (Emphasis added).

LATD&ME's policy made mandatory the use of the form "sell order" as *the* specific document to be used, initiated by the investor, and processed by the company, to accomplish the liquidation of an investor's account.

The covering letters sent by some investors with their "sell orders" were deemed by LATD&ME as a necessary adjunct to the form itself. Of the 213 "sell orders" which *did* contain a customer letter,[79] 184 had a notation on the "Special Instructions" line, specifically adopting the attached letter by direct reference to it.[80] In addi-

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[79]The letters were all stapled to the "sell orders," ostensibly by the company.

[80]*E.g.,* "See attached letter for instructions."

tion, some customers, pursuant to LATD&ME's request, returned the company's "form letter"[81] which had solicited their assent that their liquidation was due to the adverse publicity the company allegedly had received. These "form letters" were similarly retained by LATD&ME as stapled attachments to their respective "sell orders."

In *Bisno v. United States,* 299 F. 2d 711 (9th Cir. 1961), certiorari denied 370 U. S. 952 (1962), letters were held to be admissible under 28 U. S. C. 1732. Appellant there contended:

> ". . . some of the correspondence in said exhibits was not written by him, and argues that letters, as distinguished from records of events and book entries, are not admissible as an exception to the hearsay rule permitted by the Official Records Act, Title 28, U.S.C.A. §1732. It is Bisno's position that the 'Official Records Act does not extend to documents which purport to be simply recitals, like letters. And those are not records kept in the due course of business at all.' " (p. 718).

This court disregarded such contention and held:

> "We do not regard the Official Records Act as being so restrictive. This act permits the introduction into evidence of 'any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, or occurrence, or events * * * if made in the regular course of any business, and if it was the regular course of such business to make such

[81]See footnote 70 for context of "form letter".

memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. The mere fact that the memoranda taken from chronological files are in the form of letters does not operate to remove the materials in 58-A - 65A from the Official Records Act. Neither does the fact that some of the letters were not written by Bisno himself affect the admissibility of such letters under the act, since that act provides 'all other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility' . . .

". . . Bisno has pointed to nothing about the form or substance of the correspondence appearing in Exhibits 58-A - 65-A which removes it from the ambit of the Official Records Act or places it outside the policy of exceptions to the hearsay rule contemplated by that act." (pp. 718-719).

See also:

Bodnar v. United States, 248 F. 2d 481 (6th Cir. 1957).

Appellants state "numerous notations by parties unknown" are found on documents contained in Exhibit 6003. There was no objection raised below as to the authenticity of these notations. The notations generally consist merely of initials, dates, times, or similar markings indicating they were made by personnel of LATD-&ME as part of their systematic procedure utilized in processing these documents.

The documents contained in Exhibit 6003 are clearly the kind of ". . . contemporaneous record of events, systematically prepared . . ." by LATD&ME for its own use and ". . . relied upon by it in the performance of its functions . . ." in liquidating investors' accounts.

La Porte v. United States, 300 F. 2d 878 (9th Cir. 1962).

It is submitted that the sell orders and their letter attachments were utilized as a systematic record keeping process, prepared for the purpose of expediting orderly liquidation of investors' accounts; and that they were material and competent, due to the intrinsic relation of the documents to the very nature of LATD&ME's business, and were properly received in evidence for the purpose offered.

6. No "Plain Error" or Substantial Harm Resulted to Appellants From the Admission of Exhibit 6003.

Assuming *arguendo,* this court were to find the records in question are not "business" records, and that appellants have not "waived" their present objection or "invited the error" of which they now complain, it is respectfully submitted that Government Exhibit 6003's admission into evidence was but "harmless error" within the meaning of Rule 52 of the Federal Rules of Criminal Procedure.[82] As the Supreme Court said regarding the existence of error in the record,

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[82]"Rule 52. Harmless Error and Plain Error.

"(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

"(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

> ". . . we cannot say that the ruling was prejudicial even if we assume it was erroneous. Mere 'technical errors' which do not 'affect the substantial rights of the parties' are not sufficient to set aside a jury verdict in an appellate court. *He who seeks to have a judgment set aside* because of an erroneous ruling *carries the burden of showing that prejudice resulted.*" *Palmer v. Hoffman,* 318 U. S. 109, 116 (1943) (Emphasis added).

Appellants have not carried their burden. Instead of showing "prejudice", they merely shout the word. Their excited statements alone do not play midwife to reality.

See also:

Lohmann v. United States, 285 F. 2d 50, 51, (9th Cir. 1960);

Gilbert v. United States, 307 F. 2d 322, 326 (9th Cir. 1962);

Smith v. United States, 173 F. 2d 181, 184 9th Cir. 1949).

Appellants contend that ". . . a cursory examination of the [approximately 800] letters will readily disclose that they contain highly inflammatory and prejudicial material . . . (See Brief DF, Appendix pp. 21-27.)" However, a more thorough examination of all of the sell orders and the letter attachments gives an entirely different impression than that portrayed in Appellant's Appendix (pp. 28 *et seq.*). Even the 51 items chosen by appellants as a "sampling" of the more

than 800 total gives lie to their claim of prejudice, as illustrated in the footnote below.[83]

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[83]*E.g.* No. 4702, Pearson, No. 4830, Dillman, and No. 6314 Meitus, are cited as "prejudicial" because they all refer to the civil judgment and newspaper accounts of Judge Clarke's statements. In actuality, the reference in each letter is the "form letter" furnished to the investor, and returned at LATD&ME's request, as an attachment to the sell order. No. 20479, Bell, also noted as "referring to the litigation and newspaper articles", actually states in reference to a previously received letter from LATD-&ME, that the company had "enclosed some reprints from the newpapers regarding some litigation of which I had previously been unaware."

Six other of appellants' "sampling" expressly state an intention to reinvest with LATD&ME as soon as their present financial need is met. Examples, No. 4496, Gellibray (sic) should be McGillivray; No. 2777, Lemons; No. 3812, Watson; No. 1300, Whittaker; No. 20208, Class; and No. 20414, Padden. Further, No. 6675, Olsen, indicates only a *partial* liquidation. Examples of the specific language used by these investors, and claimed to be "highly inflammatory" are:

> No. 4496—"This money was placed with you for the purpose of buying a home and when this matter is settled we will place funds with you again . . ."
>
> No. 2777—"I am getting wedding (sic) next month and I will need the money for the wedding and the purchase of a house.
>
> "I would thank you for your trouble and tell you that my association with you has been most pleasant and profitable. I hope before to (sic) long to be able to open another account with you.
>
> "Thank you again."
>
> No. 3812—After requesting only a partial liquidation and noting that he intends to restore his account to the original balance, this customer concludes by saying: "I wish to express my appreciation of the efficient and satisfactory manner in which my account has been handled by your company."

Another six of the sell orders contain no such letter attachment from the customer, as so indicated by appellants. The complained of language in three of the orders is attached to TD&ME letterhead memoranda, referring specifically to action to be taken by O. J. Farrell (No. 2791, Jones; No. 2742, Whitson; and No. 1366, Bonjours.) The other three state the reason for liquidating right on the face of the sell order (No. 7154, Benjamin; No. 7153, Gebhard, and No. 2815, Eagle.)

A total of 733 sell orders contained in Exhibit 6003 either stated no reason at all for closing the account or only a non-critical reason (of LATD&ME); 530 of these did not even have a letter from the investor attached to them. In addition, 32 investors had comments of praise for the company or remarks to the effect that they had enjoyed a pleasant relationship with the company; and 53 declared an intent or hope to reinvest with LATD&ME in the near future (as seen in Appellants' own sampling).[84]

Regardless of what, if anything was attached to any of the sell orders, there has been no showing that even one of them was read in the jury room. This exhibit was accompanied by over 2000 numbered exhibits containing many more thousands of documents. Even had the jury explored each in detail, appellants would not have been prejudiced, inasmuch as the other evidence admitted during the trial, whether documentary or testimonial, stated virtually all of the matter now asserted to be "prejudicial" to appellants' interests.[85]

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[84]The "newspaper article" attached to the Max Skolnick sell order, was unique, and the only such example appellants were able to challenge out of this myriad of other sell orders.

[85]*E.g.* Witness West testified he rejected three trust deeds because LATD&ME had not met the specifications he outlined to them, namely: he did not want trust deeds which could be subordinated to further liens; or on vacant land; or which had insufficient security, or which were against overvalued land; or out of the Bay region. He also testified he had not received any earnings on his principal $2,500 investment, although his money was with the company from November 21, 1958 to June 8, 1959. This lack of earnings despite the fact that the monthly statements he received, showed regular increases in his earnings [R. T. 2188-2200].

Witness Penning's letters to LATD&ME complained that he had not received the $1,392.20 earnings on his account; the company failed to answer his four letters. [GX 2016]; the company

In the instant case all of the material in Exhibit 6003 was cumulative and the rationale of *Bisno v. United States,* 299 F. 2d 711, 719 (9th Cir. 1961), certiorari denied 370 U. S. 952 (1962) is here applicable:

> ". . . While Bisno complains that said exhibits contain many irrelevant writings, he has failed to point out any material in said exhibits which he claims to be irrelvant. He further contends that the introduction en masse of such exhibits prejudiced him in the eyes of the jury. Yet he fails to point out any material in said exhibits which misled the jury or erroneously influenced the verdict of the jury."

Similarly, in *United States v. Quong,* 303 F. 2d 499, 504 (6th Cir. 1962), certiorari denied 371 U. S. 863, the court, noting that certain documents were in substantial compliance with the provisions of 28 U. S. C. 1732, pointed out:

> ". . . However, in any event this documentary evidence was cumulative as there was . . .

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did not pay him the 10% return [GX 2071]; and that he liquidated because of his business needs [GX 2012].

Witness Beerup testified of her displeasure in having a delinquent trust deed in her account [R. T. 1063]; (LATD&ME's records indicating her trust deed had been delinquent since February 1, 1960) [GX 515, R. T. 1099].

Witness Henno expressed her concern to LATD&ME about the investigation of the 10% companies. She was told that LATD&ME was not under investigation; that the judge was prejudiced and that it was the newer companies other than LATD&ME who were being investigated [R. T. 1134-1139].

Witness Eppley testified that after reading about LADT&ME's litigation with the S.E.C. in the newspaper, she was worried about LATD&ME and went to visit the company with the intention of asking for her money [R. T. 768].

[other proof]. Some of the other record evidence was also cumulative.

"We believe and conclude that the admission of the documentary evidence by the District Judge, charged as erroneous, did not visit any prejudice upon the appellants, nor 'affect substantial rights' of the appellants. Rule 52(a) Federal Rules of Criminal Procedure . . ." (Other citations omitted).

See also:

Bailey v. United States, 282 F. 2d 421, 426 (9th Cir. 1960), certiorari denied 365 U. S. 828 (1961);

Stevens v. United States, 256 F. 2d 619, 623-625 (9th Cir. 1958);

Papadakis v. United States, 208 F. 2d 945, 952 (9th Cir. 1953);

Gordon v. United States, 164 F. 2d 855, 858 6th Cir. 1947); certiorari denied, 303 U. S. 862 (1948);

Finnegan v. United States, 204 F. 2d 105, 112 (8th Cir. 1953), certiorari denied, 346 U. S. 821.

It is respectfully submitted in the case at bar there was overwhelming proof that appellants designed and engineered the fraudulent nature of the business operations of LATD&ME. The admission into evidence of Exhibit 6003 did not affect the substantial rights of appellants, nor result in a manifest miscarriage of

justice.[86] As said in *United States v. Maisel,* 183 F. 2d 724, 726 (3rd Cir. 1950):

> ". . . Our search of the record fails to show that appellant was seriously prejudiced by the evidence. Virtually all of the vital facts have been conceded. Under the pertinent law they constituted overwhelming proof of appellant's guilt as charged in the indictment. The verdict was the only reasonable result which could have been arrived at by the jury."

F. The Evidence Is Sufficient to Sustain the Jury's Finding That Appellants Were Guilty as Charged in the Indictment.

The Government respectfully submits that the evidence is sufficient to sustain the jury's verdicts. Especially is this true when this court considers the evidence and inferences that can be drawn from it most favorably to the Government.

*Glasser v. United State*s, 315 U. S. 60 (1941);

Sandez v. United States, 239 F. 2d 239 (9th Cir. 1956);

Robinson v. United States, 26 F. 2d 645 (9th Cir. 1959);

Young v. United States, 298 F. 2d 108 (9th Cir. 1962) *certiorari denied* 370 U. S. 953.

Benchwick v. United States, 297 F. 2d 330 (9th Cir. 1961).

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[86]See: *Gilbert v. United States,* 307 F. 2d 322 (9th Cir. 1962).

As the Supreme Court said in *Glasser v. United States, supra* at 80:

> "It is not for us to weigh the evidence or to determine the credibility of witnesses. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it. . . . Participation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a 'development and a collocation of circumstances.' " (Citations omitted.)

The credibility of witnesses and the weight to be attached to their testimony is certainly a matter within the province of the trial court who has had the opportunity to see and hear the witnesses.

> *Stoppelli v. United States,* 183 F. 2d 391 (9th Cir. 1950) *certiorari denied* 340 U. S. 864.
>
> *Norfolk v. McKenzie,* 116 F. 2d 632 (6th Cir. 1941).

Appellee submits that the evidence presented at the trial, as indicated in the Statement of Facts, clearly was sufficient to sustain the jury's verdicts of guilt as to appellants.

Conclusion.

The appellants David Farrell and Oliver J. Farrell were convicted by a jury after a fair trial. Their contentions before this court are without substance or merit. The judgments and sentences should be affirmed.

Respectfully submitted,

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

EDWARD M. MEDVENE